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No. 95-1879

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES DEPARTMENT OF AGRICULTURE,

Petitioner,

vs.

CAL-ALMOND, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

The petitioner is the United States Department of Agriculture, which was the defendant below. The Respondents, which were the plaintiffs below, are Cal-Almond, Inc., Carlson Farms, Gold Hills Nut Company, Inc., Gourmet Packing, Inc., Frazier Nut Farms, Inc., and Ellen Briones, Chapter 7 Trustee in Bankruptcy for Saulsbury Orchards and Almond Processing, Inc.

None of the Respondents have any parent companies nor any subsidiaries nor do any of them issue shares of stock to the public. (Supreme Court Rule 29(6)).

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Respondents respectfully oppose the petition for writ of certiorari, and pursuant to Supreme Court Rule 15.2, direct the Court to misstatements of fact and/or law in the petition that bears on what issues properly should be before the Court if certiorari were granted.

OPINIONS BELOW

The initial opinion of the Court of Appeals for the Ninth Circuit which addressed and resolved the First Amendment question presented in the petition is *Cal-Almond, Inc., et al. v. USDA*, and is contained in the Solicitor's Appendix (hereinafter "SOL App."), (SOL App. D, 49a) and is reported at 14 F.3d 429 (hereinafter *Cal-Almond I*). Following a remand by the Ninth Circuit Court of Appeals to the District Court for a determination of the remedy, the matter proceeded once again to the Ninth Circuit regarding only the remedial issue. That opinion is contained in SOL App. A beginning at p. 1a. It is reported at 67 F.3d 874 (hereinafter *Cal-Almond II*).[1]

Following the Ninth Circuit's decision in *Cal-Almond I* the government sought rehearing as to the First Amendment issue, and the Ninth Circuit denied the government's petition for rehearing on April 5, 1994. (Resp. App. A).

The other opinion of importance herein is the Ninth Circuit

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1. Respondents in this case have filed a petition for writ of certiorari from the *Cal-Almond II* decision to the extent the Ninth Circuit denied a refund of assessments "paid to third parties" as being barred by sovereign immunity. That petition for writ of certiorari was filed on May 20, 1996 and placed on the Docket June 10, 1996 as No. 95-1978 (the delay in docketing was as a result of Respondents' counsel of record not yet having been admitted to the Supreme Court. Respondents' counsel of record was, by a separate order of the Court, subsequently admitted to practice before the Supreme Court).

Court of Appeals decision in *Wileman Bros. & Elliott, Inc., et al. v. Espy*, which is reported at 58 F.3d 1367 (1995) wherein the Secretary has filed a petition for writ of certiorari, No. 95-1184 which was granted on June 3, 1996 (hereinafter "*Wileman* decision").

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals in *Cal-Almond II* was entered on October 10, 1995, and Respondents' petition for rehearing was denied on February 20, 1996. (SOL App. L). The Solicitor claims jurisdiction in this case to be invoked under 28 U.S.C. § 1254(1). Title 28 U.S.C. § 2101(c) requires that a petition for writ of certiorari be filed within 90 days after entry of such judgment or decree. (*See also*, Supreme Court Rule 13.1). Respondents contend that the Solicitor has filed its petition for a writ of certiorari out of time, since it is not seeking review of the remedial decision of the Ninth Circuit in *Cal-Almond II* which was final on February 20, 1996, but from the First Amendment decision in *Cal-Almond I* which was final, as result of the denial of the government's petition for rehearing, on April 5, 1994. (Resp. App. A).

The jurisdictional argument will be discussed below under **ARGUMENT**.

SUMMARY OF ARGUMENT

1. This Court does not have jurisdiction over the Solicitor's petition for writ of certiorari in this case because the final judgment of the Ninth Circuit Court of Appeals relative to the issues presented by the Solicitor in this case was on April 5, 1994. The Solicitor is not seeking review from the *remedial* decision rendered by the Ninth Circuit Court of Appeals in *Cal-Almond II* which was final on February 20, 1996. The *remedial* decision did

not at all decide whether or not the Almond Marketing Order's compelled expenditures for promotion and advertising violated the First Amendment, as that First Amendment issue was decided on December 22, 1993 and final for purposes of filing a petition for writ of certiorari when the government's petition for rehearing was denied on April 5, 1994. (Resp. App. A).

The Solicitor is attempting to bootstrap the final judgment of the Ninth Circuit with respect to the remedial determination issued on February 20, 1996 (SOL App. L) as the beginning of the 90 day clock, but the Solicitor is not at all challenging the remedial decision in its petition for writ of certiorari. It is only challenging the judgment in *Cal-Almond I* that the Almond Marketing Order's generic advertising program violated the First Amendment rights of Respondents. 28 U.S.C. § 2101(c) requires that review shall be taken or applied for "within 90 days after the entry of judgment or decree." Rule 13.1 of the Rules of the Supreme Court likewise require that a petition for a writ of certiorari to review a judgment issued by any United States Court of Appeals be filed within 90 days after entry of the judgment. The judgment sought to be reviewed herein is the one issued by the Ninth Circuit in *Cal-Almond I*, not *Cal-Almond II*. Therefore the petition is not timely.

2. Rule 15.2 of the Rules of the Supreme Court states that any opposition to a petition for certiorari should address any "perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted."

In this case, the Solicitor notes on several occasions that the Almond Marketing Order program at issue here was distinctly different than the Peach, Plum and Nectarine Order (hereinafter "Treefruit Order") determined in *Wileman*. (For example, Petition at pp. 13-16, and accompanying footnotes). The

Solicitor General stated the same thing in its petition for certiorari in *Wileman* (at 24, fn. 16). In *Wileman*, the Solicitor General stated that it did not "petition for a writ of certiorari in *Cal-Almond* because the Ninth Circuit's decision there was based in part on specific features of the regulations establishing the generic advertising program for almonds as to which the Secretary was considering significant amendments at the time of the Ninth Circuit decision." (Solicitor's Brief at 24, fn 16 in *Wileman*).

Acknowledging the distinct differences between the pure generic promotion and advertising program in Treefruit (mandatory assessments wherein the Board made up of competitors advertises and promotes Treefruit over the Respondents' objections therein) and for almonds where the generic promotion program was a very small feature of it, but a critical feature being that a large portion of the assessments were required to be spent by the Respondents pursuant to severe restrictions that were worthless to the Respondents and designed to benefit the Respondents primary competitor, Blue Diamond, Inc. (*see* Solicitor's Petition at pp. 13-15 and accompanying footnotes). The Solicitor requests this Court — not to hear this matter, thus precluding the Respondents from fully briefing it and orally arguing it — but to hold it in abeyance and dispose of it "as appropriate in light of the disposition of the petition for a writ of certiorari [in *Wileman*]". (Solicitor's Brief at 17).

The Solicitor acknowledges (Brief at 16) that "there is no continuing importance to the manner in which the First Amendment applies to the particulars of the former creditable advertising regulation and the marketing order for California Almonds." The petition also states that "*Wileman Bros.* provides a more appropriate vehicle for resolution of the First Amendment issues than does this case." *Id.* Respondents allege that: (1) the petition for writ of certiorari should either be denied because it

does not satisfy any of the certiorari criteria appearing in Supreme Court Rule 10.1 (or this Court has no jurisdiction because it was filed out of time); (2) or certiorari should be granted so as to allow the Respondents the ability to fully brief the unique issues and facts regarding the Almond Marketing Order and for oral argument, instead of being treated as though it is the forgotten stepchild; and/or (3) any review in *Cal-Almond* should be with respect to only the Board's limited generic promotion and advertising program, not with respect to whether the creditable advertising assessments violated the First Amendment rights of the Respondents because (a) the Solicitor has waived that argument by appearing to only attack the Almond Board's "generic promotion program" and acknowledging that the creditable advertising assessments and regulations are no longer important because they have been changed (Solicitor's Brief at 13-16 and accompanying footnotes); and (b) the Ninth Circuit decision in *Cal-Almond I*, finding that the creditable advertising assessments and regulations promulgated thereunder unconstitutionally restricted truthful forms of advertising, without any showing of a compelling governmental interest, and not advancing that governmental interest, and not narrowly tailored (*Cal-Almond I* at SOL App. 65a-70a) does not conflict with any opinions of this Court, does not conflict with any other Court of Appeals decisions and does not involve an important question of federal law that has not been, but should be, settled by this Court.

This Court, in a consistent line of cases beginning with *Central Hudson Gas & Electric Corp. v. Public Service Commission of NY*, 447 U.S. 557 (1980) through the most recent decision on May 13, 1996, *44 Liquor Mart, Inc., et al. v. Rhode Island* (94-1140), 96 Daily Journal DAR 5459, has held that the government cannot restrict truthful, non-misleading advertising unless there is: (1) a substantial governmental interest; (2) the regulation substantially advances the governmental interest; and

(3) the regulations are narrowly tailored. This is the same test the Ninth Circuit applied in the instant case. (*Cal-Almond I*, SOL App. 62a-70a).

Since the Solicitor General has not properly preserved any challenge with respect to the creditable advertising assessments and the regulations imposed upon the handlers with respect to those creditable advertising assessments, any granting of certiorari in this case should be limited solely to the generic promotion program requiring all handlers to pay a certain amount of assessments to the Board for the Board's generic promotion and advertising — not for creditable advertising. Moreover, if the Court is inclined to grant certiorari, Respondents should be permitted to fully brief the issues and orally argue them as opposed to adopting the Solicitor's suggestion that the Court hold and dispose of this case in light of the disposition in *Wileman*.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION OVER THE PETITION FOR CERTIORARI AS IT WAS FILED OUT OF TIME.

In *Cal-Almond I* the Ninth Circuit decided (SOL App. 55a-70a) that the Almond Marketing Order's program and assessments relating to advertising and promotion violated Respondents' rights guaranteed under the Free Speech Clause of the First Amendment. The Ninth Circuit determined that assessments paid to the Almond Board for the Board's generic promotional program, and the assessments imposed against the handlers to either pay to the Board for the Board's generic promotional program, or to spend for "creditable advertising"

pursuant to the rules and restrictions contained in the Almond Marketing Order (7 C.F.R. §§ 981.4 & 981.441; SOL App. 492a-496a; the program being described by the Ninth Circuit at SOL App. 51a-58a) violated the Respondents' right guaranteed under the First Amendment of the United States Constitution. In all other respects the Ninth Circuit found the other provisions of the Almond Marketing Order challenged by the Respondents to be lawful. With respect to the remedy for the First Amendment violations, the Ninth Circuit determined that it was fact intensive and should be first addressed by the district court. The Ninth Circuit then remanded to the district court with respect to the remedy. (*Cal-Almond I*, SOL App. 93a-95a). The Ninth Circuit's decision in *Cal-Almond I* was filed on December 22, 1993. The government filed a petition for rehearing which was denied on April 5, 1994. (Resp. App. A). Thus the Ninth Circuit decision with respect to the First Amendment issue was final on April 5, 1994.

The matter proceeded back to the district court for a remedy, the district court determined that the Respondents were entitled to a refund of all advertising and promotion assessments for the crops years in question (1980-81 through 1991-92) that were either paid to the Board for the Board's generic promotion and advertising program, spent on advertising pursuant to the compulsion of § 981.41 and § 981.441 for advertising and promotion, or rebelliously escrowed (in the face of the government's suing the Respondents for not paying the assessments to the Board) in an attorney-client trust fund account or on deposit with the clerk of the court. (*See* SOL App. 44a-48a).

The government then filed an appeal with respect to the remedy decision of the district court, and on October 10, 1995 the Court of Appeals in *Cal-Almond II* affirmed in part and reversed in part. The Ninth Circuit held that all assessments paid by the

Respondents to the Almond Board for the Almond Board's generic promotion and advertising program, or were unused creditable advertising assessments paid by the Respondents to the Almond Board, and all monies escrowed or deposited with the clerk of the court reflective of the advertising and promotion assessments must be refunded to the Respondents. (*Cal-Almond II*, SOL App. 9a-17a).

With respect to creditable advertising assessments that Respondents paid "to third parties" (those would be third party advertisers), sovereign immunity would bar a refund of those assessments because they were never paid to the Board — even though Respondents spent them on behalf of USDA and the Almond Board. (*Cal-Almond II*, SOL App. 4a-9a).[2]

The Ninth Circuit's decision in *Cal-Almond II* did not at all modify its First Amendment decision in *Cal-Almond I*. The government never sought in *Cal-Almond II* to modify the Ninth Circuit's First Amendment decision in *Cal-Almond I*, and the only issues before the court in *Cal-Almond II* were the various issues of the remedy relating to the assessments. Respondents herein filed a petition for rehearing and suggestion for rehearing *en banc* with respect to the sovereign immunity issue and that was denied on February 20, 1996. (SOL App. 474a).[3]

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2. The Ninth Circuit had obvious difficultly in barring a refund of spent creditable advertising assessments under the doctrine of Sovereign Immunity: "Our analysis regarding sovereign immunity leads us to a somewhat awkward result: Although the handlers' compelled expenditures on creditable advertising violated their First Amendment rights, there is no individual remediation available for those violations. [citations omitted] * * * Under the Doctrine of Sovereign Immunity, we are compelled to conclude that the handlers' claims for reimbursement of the amounts they were wrongfully compelled to pay for creditable advertising is a right for which there is no individual remedy." (*Cal-Almond II*, SOL App. 8a-9a).

3. The government never sought rehearing before the Ninth Circuit with (Cont'd)

The Solicitor's petition for certiorari in this case was filed on May 20 1996 exactly 90 days after the Ninth Circuit denied Respondents' petition for rehearing in *Cal-Almond II* on February 20, 1996. However the petition filed in this case does not direct its attention to the remedy provided by the Ninth Circuit in *Cal-Almond II*, but only the Ninth Circuit First Amendment decision in *Cal-Almond I* which was finally decided more than two years before the petition was filed in this case. The question presented in the petition here relates solely to the First Amendment. (*See* "Question Presented").

Title 28 U.S.C. § 2101 states in pertinent part: "Any other appeal or any writ of certiorari intending to bring any judgment or decree in a civil action suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree." Rule 13.1 of the Rules of the Supreme Court likewise requires a petition for certiorari to be filed within 90 days after entry of the judgment. The Solicitor in this case is attempting to use the judgment in *Cal-Almond II* as the coattail for filing its petition in this case when it does not seek review of the *Cal-Almond II* judgment.

In *Federal Trade Commission v. Collegate-Palmolive Co.*, 380 U.S. 374 (1965) the Court held that if the Court of Appeals " ' . . . did no more by the second judgment than to restate what it had decided by the first one * * * the 90 days would start to run from the first judgment.' [citations.]" (ellipses in *Collegate-Palmolive*) *id.* at 380 U.S. 378-79.

(Cont'd)
respect to the remedies that the Ninth Circuit did provide. As stated previously the Respondents in this case timely filed a petition for certiorari before this Court on May 20, 1996, docketed June 10, 1996, Case No. 95-1978 seeking review of the Ninth Circuit's sovereign immunity issue. The rules regulations and restrictions regarding the Almond Marketing Order are discussed in more detail in said petition for certiorari.

The Solicitor has previously acknowledged in its petition for certiorari in *Wileman*, Case No. 95-1184, that it could have filed a petition for a writ of certiorari from the *Cal-Almond I* decision but chose not to do so "based in part on specific features of the regulations establishing the generic advertising program for almonds as to which the Secretary was considering significant amendments at the time of the Ninth Circuit's decision." (Solicitor's Petition in *Wileman* at 24 n. 16). However, the only consideration for changes was with respect to the creditable advertising regulations. (*See* Resp. App. C).

The *Wileman* case was similar in its procedures as *Cal-Almond*. The Agricultural Marketing Agreement Act requires that handlers aggrieved by a marketing order must file an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). *Cal-Almond* and *Wileman* both proceeded through the exhaustion process before USDA and then proceeded to the district court upon the decision by the Judicial Officer pursuant to 7 U.S.C. § 608c(15)(B). *Cal-Almond I* reached the Ninth Circuit first and the Ninth Circuit rendered its decision on December 22, 1993 finding that the advertising and promotion program violated the First Amendment and remanded it back to the district court for purposes of determining the remedy. The *Wileman* case eventually reached the Ninth Circuit Court of Appeals and on June 27, 1995 the Ninth Circuit found that the generic promotion and advertising program for Treefruit violated the handlers' rights in contravention of the First Amendment and remanded it back to the district court "to fashion an appropriate remedy consistent with this opinion." (SOL App. in *Wileman* 34a-35a; 58 F.3d 1386).

However before the district court could reach the issue of a remedy in *Wileman* the Solicitor filed a petition for certiorari in that case with virtually the identical "question presented" as presented in the instant case, to wit: "Whether it violates the First

Amendment for the Secretary of Agriculture, pursuant to Marketing Orders issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* to require the handlers of California peaches, nectarines and plums to fund generic advertising programs for those commodities."

In its petition for certiorari, the Solicitor invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (p. 2 of Petition in *Wileman*), and in footnote 2 of same petition, it claims that because the *Wileman* Ninth Circuit orders were unclear as to when the case was "finally effective" "we have treated the date of the first order denying rehearing — September 18, 1995 — as the one that triggered the 90 day period for filing a petition for a writ of certiorari prescribed in 28 U.S.C. § 2101(c) and this Court's Rule 13.1, and on that basis we requested extensions of time within which to file a petition for a writ of certiorari." (p. 2 of *Wileman* petition, fn. 2).

Thus in *Wileman*, the Solicitor treated the 90 day rule of § 2101(c) to be from the date the petition for rehearing was denied in *Wileman relative to the First Amendment issue but in this case they are attempting to treat the remedial judgment in Cal-Almond II as the starting point for the 90 day period but seeking review of the Cal-Almond I decision.* Since the *Cal-Almond II* decision did not disturb the decision in *Cal-Almond I* nor did the government seek to disturb, in *Cal-Almond II*, the *Cal-Almond I* judgment the 90 day period began on April 5, 1994 when the Ninth Circuit in *Cal-Almond I* denied the government's petition for rehearing with respect to that First Amendment issue. Thus at the very least (*but see, Collegate-Palmolive, supra*) either the petition for certiorari in *Wileman* was premature (because the remedy had not been addressed) or the petition filed in the instant case is far too late. Based upon 28 U.S.C. § 2101(c) the petition for certiorari in this case is out of time and this Court lacks jurisdiction to entertain it.

II.

EVEN IF THE PETITION WAS TIMELY FILED, THE CREDITABLE ADVERTISING ASSESSMENTS AND THE REGULATIONS RELATING TO THE SAME ARE NOT ISSUES FAIRLY INCLUDED IN THE QUESTION PRESENTED FOR REVIEW.

The question presented by the Solicitor in this case is: "Whether it violates the First Amendment for the Secretary of Agriculture pursuant to a marketing order issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.* to require the handlers of California almonds to fund a generic advertising program for that commodity." The question is virtually identical to the question presented in the Solicitor's *Wileman Bros.* petition for certiorari. The Treefruit Marketing Order at issue in *Wileman* did not at all involve creditable advertising assessments nor restrictions and regulations regarding permissible (or restricted) expenditures for creditable advertising presented under the Almond Marketing Order. The Solicitor acknowledges herein that the features of each program are relevantly different. (Petition at 15-16 and accompanying footnotes).

Despite the clarity of the question presented in the instant case *i.e.* it relates solely to assessments handlers are required to pay to the Board for the *Board to carry out generic promotion and advertising* (similar to that in *Wileman*) the Solicitor, at times in its petition, seems to indicate that it is challenging *both* the generic program and the creditable advertising feature of the Ninth Circuit's decision in *Cal-Almond I* but then appears to go full circle and seems to challenge only the generic aspect of the program and not the creditable advertising regulations and assessments.[4]

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4. For example at page 11 of the petition the Solicitor states: "Because (Cont'd)

Rule 14.1(a) of the Rules of the Supreme Court states that the question presented must be "expressed concisely in relation to the circumstances of the case without unnecessary detail" and that "the statement of any question presented is deemed to comprise every subsidiary question fairly included therein," and that "only the question set out in the petition or fairly included therein will be considered by the court." Respondents contend that based upon the question presented in this case, which is the identical question presented in *Wileman*, and because the Solicitor stated in *Wileman* (Petition at 24 fn. 16) why they did not seek certiorari in *Cal-Almond*, the only issue "fairly included in the question presented relates solely to the Almond Board activities of using assessments for generic promotion and advertising *but does not include any challenge to the Ninth Circuit's decision finding unconstitutional the regulations and restrictions of 7 C.F.R. § 981.41 and § 981.441* regulating and restricting creditable advertising, nor the creditable advertising assessments."

This Court noted in *Yee v. City of Escondido*, __ U.S. __, 112 S. Ct. 1522, 1532-1534 (1992) that the question presented therein was really a question as to whether or not the court below erred in finding "no physical taking" and therefore the question of whether or not the rent control ordinance effected a "regulatory taking" was not "fairly included therein." *Id.* at 1533.

(Cont'd)
the Ninth Circuit had based its decision in part on the restrictions to which the Secretary was considering revisions the Secretary did not at that time petition this court for a writ of certiorari to review the Ninth Circuit's judgment on the First Amendment issue." At pages 13-14 of said petition the Solicitor again remarks how different the two programs are with respect to the creditable advertising assessments, but that because the court in *Wileman Bros.* did not restrict its reading of the First Amendment of the *Cal-Almond* decision to be solely a complaint with respect to the creditable advertising assessments but also applied it to the generic promotion program the court should grant certiorari in this case for the same reasons it warranted review in *Wileman*.

Thus in this case the Ninth Circuit's decision in *Cal-Almond I* finding unconstitutional the creditable advertising assessments and the creditable advertising rules and regulations as violating the handlers' First Amendment rights is not fairly included within the question presented herein of whether or not the Almond Board's generic program (funded by *other* assessments) violates the handlers' First Amendment rights.

III.

IF THE CREDITABLE ADVERTISING ASSESSMENTS AND REGULATIONS ISSUES DECIDED BY THE NINTH CIRCUIT IN *CAL-ALMOND I* ARE FAIRLY INCLUDED WITHIN THE QUESTION PRESENTED THE ISSUES FAIL TO SATISFY ANY OF THE CERTIORARI CRITERIA APPEARING IN SUPREME COURT RULE 10.1.

The Ninth Circuit decision on *Cal-Almond I*, with respect to the creditable advertising regulations and assessments, applied the *Central Hudson* four-part test (SOL App. 58a-70a).

Quite clearly the creditable advertising regulations and restrictions found in 7 C.F.R. § 981.41 and § 981.441 are not at all concerned with "truthfulness" or "deceptiveness" but specifically restrict truthful forms of advertising and promotion for which credits for assessments will not be allowed.

The Ninth Circuit found (SOL App. 65a-70a) that those restrictions hindered handlers' advertising and promotion programs, that the restrictions made no sense and were designed to favor Blue Diamond the largest competitor in the industry.

Since at least 1980 when this Court decided *Central Hudson* the law has been clear that commercial speech cases are subject to a four-part analysis. (*Central Hudson*, 447 U.S. 566) This

four-part test has been applied in every one of this Court's commercial speech cases for the last decade[5] until May 13, 1996 when this Court in *44 Liquor Mart Inc., et al. v. Rhode Island supra* basically eviscerated the distinction between commercial speech and "fully protected" speech and basically held that if the advertisements propose a legal proposition and are not deceptive the government, because of the First Amendment, is without power to regulate. While there were various concurring opinions the bottom line is that, even if the four-part test of *Hudson* applied, the State of Rhode Island could not prohibit truthful advertising of alcohol prices. Thus, in the present case, if the less protected commercial speech (*vis a vis* political speech) test is applied the creditable advertising regulations and assessments imposed for the same[6] would be summarily struck down pursuant

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5. *See Rubin v. Coors Brewing Co.*, __ U.S. __, 115 S. Ct. 1585 (1995); *Florida Bar v. Went-For-It, Inc.*, __ U.S. __, 115 S. Ct. 2371 (1995); *Ibanez v. Florida Dept. Of Business & Professional Regulations, etc.*, __ U.S. __, 114 S. Ct. 2084 (1994); *Edenfield v. Fane*, __ U.S. __, 113 S. Ct. 1792 (1993); *United States v. Edge Broadcasting Co.*, 509 U.S. __, 113 S. Ct. 2696 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. __, 113 S. Ct. 1505 (1993); *Board of Trustees of the State University of NY v. Fox*, 492 U.S. 469, 475, 109 S. Ct. 3028 (1989); *Posadas de Porto Rico Associates v. Tourism Co. Of Porto Rico*, 478 U.S. 328, 106 S. Ct. 2968 (1986).

6. This Court has long held that compelled contribution for others' speech is protected under the free speech clause as equally as restrictions on speech (*Abood v. Detroit Board of Education*, 431 U.S. 209, 235-36 (1977); *Lehnert v. Ferris Faculty Assoc.*, __ U.S. __, 111 S. Ct. 1950 (1991)) and financial burdens imposed on speakers is also equally protected against (*Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, __ U.S. __, 112 S. Ct. 467, 508 (1991); *Forsyth County, Georgia v. The Nationalist Movement*, __ U.S. __, 112 S. Ct. 2395, 2404 (1992)); *United States v. National Treasury Employees Union*, __ U.S. __ 115 S. Ct. 1003, 1014 (1995) (A federal statute prohibiting the receipt of honoraria by government employees for giving speeches or writing violated their First Amendment (Cont'd)

to this Court's previous decisions cited *supra*.[7]

IV.

IF CERTIORARI IS GRANTED IT SHOULD NOT BE "HELD AND DISPOSED OF AS APPROPRIATE IN LIGHT OF THE DISPOSITION OF THE PETITION [IN *WILEMAN*]".

Throughout the Solicitor's petition it is claimed that the almond advertising program is different than the Treefruit program and that "we believe that *Wileman Bros.* provides a more appropriate vehicle for review of the First Amendment issue than does this case." (Petition at 13). The Solicitor then proposes that "the petition for writ of certiorari should be held and disposed of as appropriate in light of the disposition of the petition for a writ of certiorari in [*Wileman*]." (pp. 13-17) Respondents vehemently object to this case and these Respondents being treated as the forgotten stepchildren. The Respondents in this case had their First Amendment issue decided over one and half years before the Ninth Circuit reached

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(Cont'd)
rights despite the fact that the employees were not "prohibited" from speaking; " . . . its prohibition on compensation unquestionably imposes a significant burden on expressive activity. [citation omitted.]" *id.* at 1014).

7. With respect to the Almond Board's "generic" advertising and promotion program financed by assessments other than creditable advertising assessments, Respondents do *not* argue herein that that issue does not satisfy the certiorari criteria appearing Supreme Court Rule 10.1 as it would be foolish to do so in light of the fact that this Court has previously granted certiorari in *Wileman* with respect to an identical question. But in that regard Respondents still contend that certiorari cannot be granted because the petition was untimely filed.

the decision in *Wileman*. As the Solicitor acknowledges, the Ninth Circuit in *Wileman* relied extensively on the decision in *Cal-Almond I* (Petition at 12). The Respondents have advanced this case much further than the Respondents have in *Wileman* given the fact that Respondents in this case proceeded through the remedy phase and received a decision in *Cal-Almond II*. The Respondents have filed a petition for certiorari in *Cal-Almond II* (with respect to the issue of sovereign immunity). The Respondents have filed an amicus brief in the *Wileman* case and the impact of this Court's decision in *Wileman* would obviously have an impact (the extent of which of course unknown and unknowable at this time) with respect to not only the constitutionality of the "old" almond program, but the current ongoing Almond Marketing Order promotion and advertising program and Respondents' obligations under that program. (*See* Resp. App. B).

The Solicitor alleges (Petition at 11) that the new revisions to the creditable advertising regulations "eliminate many of the former restrictions of the types of advertising for which an individual handler may receive credit against its assessments (*citing* 59 Fed. Reg. 35,226-35,227). However these regulations were immediately challenged by these Respondents and additional almond handlers, and administrative proceeding have taken place pursuant to 7 U.S.C. § 608c(15)(A). On June 15, 1996 the Administrative Law Judge issued a ruling finding that the new regulations for credit still violate the First Amendment and that the Secretary once again failed to show that either the generic promotion program or the creditable advertising program substantially advances any substantial governmental interest, and that the restrictions were not narrowly tailored. (*See* Resp. App. B).[8] The new rules still prevent credit for various

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8. The ALJ decision was appealed by USDA to its Judicial Officer who has stated it desires to withhold ruling on it until this Court decides *Wileman*.

types of truthful honest promotion and advertising and now only permit a two-thirds credit (and a lesser amount depending upon the percentage of almonds in a particular ingredient product) as opposed to what previously allowed a 100% credit. (*See* Resp. App. C; 7 C.F.R. § 981.441(a) and (e)(1)-(e)(4) and (e)(4)(iii) and (iv)).

The Almond Board and USDA still occupy the position under the new regulation as judge and jury as to whether or not the advertisement and promotion conducted by handlers receive credit (7 C.F.R. § 981.441(a)) and they still review the handlers' advertising and promotion efforts and allow a board of competitors to sit in review as to whether or not the advertisements can receive credit. (7 C.F.R. § 981.441(f)). Thus the Solicitor's statement (Petition at 11) that "many of the former restrictions on the types of advertising for which an individual handler may receive credit against its assessment" have been eliminated, is not true.

Based upon the procedural position of the Respondents in this case, the Respondents in *Wileman,* the fact that the Respondents herein have filed a petition for writ of certiorari with respect to the sovereign immunity remedy issue, and that current ongoing challenges to the "new" almond regulations are occurring, the Respondents herein should have far more input into the Court's decision in *Wileman* than suggested by the Solicitor. Moreover if this Court believes that the Solicitor timely filed its petition it should be either denied (with the Court's decision in *Wileman* providing the authority for the generic programs (described in the Solicitor's petition in *Wileman*) in existence — other than almonds — or if certiorari is granted the Respondents should be allowed to fully brief the issue and orally argue it before the court.

The Solicitor apparently believes that it has "better facts" in

Wileman. Respondents do not disagree (even though the facts and programs involving *Wileman* should be struck down as violative of the First Amendment) but Respondents allege that if the Court is inclined to grant the petition or dispose of it as "appropriate in light of the disposition in [*Wileman*]", the Respondents should have a meaningful opportunity to fully brief the issues and participate in oral argument.

CONCLUSION

The petition for writ of certiorari should be denied as it was filed out of time. If the Court is inclined to grant the petition for a writ of certiorari it should not be held and disposed of in light of the disposition in *Wileman* but should be granted with full participation in briefs and oral arguments by the Respondents. Finally the question presented in this case does not fairly include the creditable advertising assessments or regulations imposed for the same and therefore that should not be an issue in this matter.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 5, 1994

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-16031
D.C. No. CV-91-00123-REC

CAL-ALMOND, INC., a California corporation; GOURMET PACKING CO., INC., a California corporation; GOLD HILLS NUT CO., INC., a California corporation

Plaintiffs-Appellants

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE

Defendant-Appellee

No. 92-16527
D.C. No. CV-91-00685-REC

CAL-ALMOND, INC., a California corporation; GOLD HILLS NUT CO., INC., a California corporation

Plaintiffs-Appellants

vs.

UNITED STATES OF AMERICA

Defendant-Appellee

Appendix A

No. 92-16033
D.C. Nos. CV-91-00122-REC

CAL-ALMOND, INC., a California corporation

Plaintiff-Appellant

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE

Defendant-Appellee

No. 92-16034
D.C. No. 91-00064-REC

CAL-ALMOND, INC., a California corporation; SAULSBURY ORCHARD AND ALMOND PROCESSING, INC.; CARLSON FARMS, a sole proprietorship

Plaintiffs-Appellants

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE

Defendant-Appellee

ORDER

Before: CHOY, SCHROEDER, and BRUNETTI, Circuit Judges.

Appellee's petition for rehearing is DENIED.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE DATED JUNE 15, 1995

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

94 AMA Docket No. F&V 981-1

In re:

Cal-Almond, Inc., Gold Hills Nut Company, Inc., and Frazier Nut Farms, Inc.,

Petitioners

AND

94 AMA Docket No. F&V 981-3

In re:

Del Rio Nut Company and Monte Vista Farming Company,

Petitioners

AND

94 AMA Docket No. F&V 981-4

In re:

Bal Nut, Inc., Carlson Farms, Central Valley Grower Packing, Hocker Nut Farm, Jardine Organic Ranch, and Rotteveel Orchards,

Petitioners

Appendix B

AND

94 AMA Docket No. F&V 981-5

In re:

Treehouse Farms, Inc.,

Petitioners

AND

94 AMA Docket No. F&V 981-7

Theron Shamgochian, Inc. dba Monte Cristo Packing Company, formerly known as Monte Cristo Packing Company and Theron Shamgochian Ranches, Inc. dba Monte Cristo Packing Company but known always to the Almond Board for the subject crop years as Monte Cristo Packing Company; Beard's Quality Nut Company, a sole proprietorship; and Amaretto Orchards, a California general partnership

Decision and Order

The Purpose and Nature of This Proceeding

Cal-Almond, Inc. v. United States Department of Agriculture, 14 F.3d 429 (9th Cir. 1993), ("*Cal-Almond I*") held that the California Almond Marketing Order's Promotion Program violated the First Amendment rights of almond handlers. The parties agree that the decision in *Cal-Almond I* is conclusive as to assessments charged Cal-Almond and the other petitioners who were parties in that case for marketing years 1980-81 through 1991-92. Cal-Almond, Gold Hills and Frazier seek to similarly have the assessments declared unlawful which

were charged them for advertising and other forms of promotional activity for subsequent marketing years. The petitioners who were not parties in the *Cal-Almond I* case seek recovery of all the assessments they paid under the Almond Order for advertising and promotion for every marketing year since 1986-87.[1]

During a prehearing teleconference conducted on November 8, 1994, I denied a motion to apply the doctrine of non-party offensive collateral estoppel against respondent, USDA, to preclude its presentation of evidence. This ruling was based on *United States v. Mendoza*, 464 U.S. 154, 158 (1984), which held that "nonmutal offensive collateral estoppel is not to be extended to the United States."

During that teleconference, I also denied respondent's motion to apply the doctrine of laches against those petitioners who awaited the Ninth Circuit's decision before asserting their claims in respect to the 1986-87 through 1992-93 marketing years. This ruling was based on the fact that an administrative law judge does not have the inherent powers of courts of law and equity and in the absence of statutory or regulatory authority may not bar claims for undue delay in their filing. *See In re Sequoia Orange Co., Inc.*, 51 Agric. Dec. 123, 127-129 (1992).[2]

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1. Theron Shamgochian and the other petitioners in 91 AMA Docket No. F&V 981-7, requested refunds back to the 1980-81 marketing year, but proposed conclusions filed by their attorney start their claim with the 1986-87 crop year.

2. This does not necessarily mean that a reviewing court will not exercise its inherent powers and bar those petitioners who delayed seeking refunds of assessments to await the *Cal-Almond I* decision. *See Gruca v. United States Steel Corp.*, 495 F.2d 1252, 1259 (3d Cir. 1974), which held delay for that reason to be inexcusable.

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Oral hearings were conducted on November 14, 1994 through November 17, 1994, in Fresno, California and on December 13, 1994 through December 16, 1994, in Los Angeles, California. An evidentiary record was developed consisting of 2,560 pages of transcript and approximately 300 exhibits. Forty-three witnesses testified.

The purpose of the hearing requires explanation. My functions would normally be wholly defined by 7 U.S.C. § 608 c (15)(A) which operates under pertinent case law to require a handler challenging an obligation under a marketing order to first seek a ruling from the Secretary that it is not in accordance with law. Only after exhausting this administrative remedy may a handler take the challenge to court. *See Saulsbury Orchards and Almond Processing, Inc. v. Yeutter,* 917 F.2d 1190, 1197 (9th Cir. 1990). This is true even when, as here, a question of constitutional law is at issue. *See United States v. Ruzicka*, 329 U.S. 287, 294 (1946).

On the other hand, the circuit which will eventually review this case has already addressed the constitutional issue that is the sole subject of the petitions. Although respondent was allowed to present new evidence in this proceeding, the legal conclusions of the Ninth Circuit on this issue are controlling. The Department of Agriculture does not pursue a policy of nonacquiescence in cases subject to review in a circuit which has already addressed a controlling legal issue. *In re Sparkman*, 50 Agric. Dec. 602, 609 (1991); *In re Stamper*, 41 Agric. Dec. 1935, 1949 (1982).

In arriving at its decision that handlers' First Amendment rights of free speech had been violated, the Ninth Circuit reviewed the operation of the California Almond Marketing Order and reached a number of legal conclusions which must be

considered binding in that circuit and thereby binding in this proceeding.

Firstly, it decided that:

> . . . while the Order, clearly does not compel appellants to advertise; it does compel them to expend a certain sum of money every year on either assessments (for generic almond promotion) or creditable advertising. Since either alternative burdens appellants' First Amendment rights, these rights are clearly implicated by a program containing both.

14 F.3d at 434. This holding is consistent with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119, 1132-33 (3d Cir. 1989), even though *Frame* eventually went on to uphold the constitutionality of the Beef Promotion Act. As in *Frame*, the *Cal-Almond I* court next applied the test specified in *Central Hudson Gas and Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980), for evaluating the constitutionality of commercial speech regulation.

This test and the Department's evidentiary burden under it, were summarized in *Cal-Almond I*:

> . . . for the almond marketing program to be constitutional, (a) the asserted government interest behind it must be 'substantial,' (b) the program must 'directly advance' that interest, and (c) the program must not be more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566,

> 100 S. Ct. at 2351. USDA has the burden of justifying the program by presenting evidence sufficient to satisfy these requirements. *Edenfield v. Fane*, __ U.S. __, __, 113 S. Ct. 1792, 1800, 123 L.Ed.2d 543 (1993).

14 F.3d at 437. USDA was held to have satisfied its first burden of proving a substantial government interest in promoting the consumption of almonds: "We agree that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest." 14 F.3d at 437.

However, USDA was held to have failed to have met its burden of showing: (1) that the almond advertising and promotion program "directly advance" the government's stated goals of selling more almonds and increasing returns to producers, and (2) that the implementing regulations were not more extensive than necessary. 14 F.3d at 437-440. In so doing, the Court pointed to the dearth of evidentiary proof by USDA that the program met both of these preconditions for government regulation of commercial speech.

Additionally, *Cal-Almond I* held that the program infringes on the First Amendment rights of handlers to free association which is subject to evaluation under an even more stringent standard than the *Central Hudson* test. Because the court held the Almond Order's Promotion Program was unconstitutional under the less stringent *Central Hudson* standard, it found no need to apply the more stringent freedom of association test set forth in *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). *See Cal-Almond I*, 14 F.3d at 436. But as petitioners point out, the

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Almond Order's Promotion Program must also pass constitutional muster under the applicable freedom of association standard.

My principal role, therefore, is to act as a fact finder and evaluate the evidence presented by USDA in the present proceedings in satisfaction of these First-Amendment standards as the Ninth Circuit has applied them to the California Almond Marketing Order.

In addition to the petitioners and the Department of Agriculture, Blue Diamond Growers, Inc. (a grower owned cooperative that markets almonds for its members) and Paramount Farms, Inc. (a handler affiliated with a grower with a similar name whose crop it markets) have been allowed to file briefs. Briefing was completed on May 9, 1995.

The Almond Promotion Program

The Almond Order's Promotion Program differs from the Beef Promotion and Research Order that was upheld as constitutional in *Frame*.

The Beef Promotion and Research Order exclusively employs mandatory assessments collected by handlers from growers to fund generic advertising and promotion. This is true of virtually every farmer/grower "self-help" program Congress has enacted to assist in the sale of agricultural commodities and enhance grower returns. This form of governmental intervention is practiced to overcome the "free rider" problem that hinders effective generic advertising when financed on a voluntary basis. Frame found this intervention justified by a national interest in "preventing further decay of an already deteriorating

beef industry . . . . (because a) continuation of this trend would endanger not only the country's meat supply but the entire economy." *Frame*, 885 F.2d at 1134.

Against this background the *Frame* court held:

> In conclusion, although we find that the Beef Promotion Act implicates the first amendment rights of those obligated to participate, we hold that the government has enacted this legislation in furtherance of an ideologically neutral compelling state interest, and has drafted the act in a way that infringes on the contributors' rights no more than necessary to achieve the stated goal.

885 F.2d at 1137. The Almond Order's Promotion Program also seeks to promote the sale of an agricultural commodity. But that is its only real similarity to the Beef Promotion Order.

The almond industry is thriving. Per capita consumption of almonds in America has grown 38% since 1986-87. Acreages allocated to almond production have increased annually. The size of the industry in terms of the numbers of growers and handlers, has likewise increased. This has been mainly fueled by increases in export sales and sales of almonds to domestic manufacturers for ingredients in candy, cereal and other products.

The major almond handler, Blue Diamond, which supplies approximately 90% of the retail market, has regularly engaged in branded advertising of its almonds and spent many times more

on advertising than any of its competitors or the Almond Board. Blue Diamond would have advertised its almonds even in the absence of the Almond Order's Promotion Program.

Generic advertising and promotion of almonds has not been, until recently at least, the major purpose of the program. The generic advertising and promotion which the Almond Board conducted through the 1992-93 market year was insubstantial and ineffective. Ostensibly, every handler was charged a creditable advertising assessment each marketing year of usually 2 1/2 cents per kernel pound of almonds handled. The handlers, however, were encouraged to conduct branded advertising and promotions for which they received credit in avoidance of the assessments. Those who did pay rather than advertise, saw part of their payments used to reduce everyone's administrative assessments for the Board's general operating expenses.

After the 1992-93 marketing year, "creditable advertising assessments" were replaced by a "credit-back" program which does generate larger sums for generic advertising and promotion. An effective generic promotion program is now conceivable, but still unimplemented. Even so, the stimulation of branded advertising and promotion continues to be an essential function of the Almond Order's Promotion Program.

The asserted governmental goal is to enhance grower returns through increased sales and higher farm prices. The essential purpose of branded advertising, however, is to increase the advertiser's share of the market. Some branded advertising programs, such as Blue Diamond's "Can-A-Week" campaign, may also increase the overall demand for the product advertised. But their real purpose is to convince prospective buyers to buy

the brand advertised. When buyers are responsive, the advertiser receives the desired benefit of greater profits, which are not, except in a most problematic sense, shared with competitors or non-aligned growers. Thus, the government interest of selling more almonds and enhancing producer returns would seem only incidentally rather than "directly" advanced by a program that actively encourages the use of branded advertising.

This function of the Almond Order's Promotion Program would appear by itself to preclude the program from meeting the Supreme Court's test for permissible government regulation of commercial speech. However, in concluding that the Promotion Program did not, directly advance the government interest asserted, the *Cal-Almond I* court stated instead:

> In sum, the record indicates that the regulations do not stimulate additional or more effective advertising from Blue Diamond. Appellants have presented evidence showing that the regulations hinder their own marketing efforts, and USDA has presented no evidence that the regulations assist the efforts of other handlers. Therefore, we hold that the regulations do not "directly advance" the government's asserted interest in increased almond sales and are therefore an unconstitutional restriction on appellant's First Amendment rights."

14 F.3d at 439. *Cal-Almond I* went on to further conclude that the creditable advertising regulations were also "more extensive than necessary" and, for that reason, contrary to the final requirement of the *Central Hudson* test which was explained as

a "reasonable fit" test in *Board of Trustees of State Univ. v. Fox*, 492 U.S. 469, 480 (1989):

> It is true that the fit between means and ends need not be perfect, but there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers such as appellants, who sell primarily to ingredient manufacturers. This court has interpreted *Fox* as holding that "restrictions which disregard far less restrictive and more precise means are not narrowly tailored." *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991). The creditable advertising regulations disregard such means, and therefore are more extensive than necessary to serve the interest of increasing almond sales.

14 F.3d at 440.

The "Directly Advance" Test and the Present Record

Respondent's brief first argues that the Ninth Circuit applied the "directly advance" test more restrictively than intended by the Supreme Court and failed to accord sufficient deference to legislative judgment.

However, the Supreme Court recently addressed this test in *Rubin v. Coors Brewing Co.*, 63 U.S.L.W. 4319 (U.S. Apr. 19,

1995), and specifically rejected the argument advanced by respondent that under *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), greater deference should be shown legislative judgment in regulating commercial speech: "Neither *Edge Broadcasting* nor *Posadas* compels us to craft an exception to the *Central Hudson* standard, for in both of those cases we applied the *Central Hudson* analysis." 63 U.S.L.W. at 4321 n.2.

The Supreme Court explained anew the application of the "directly advances" part of its test for determining whether a regulation of commercial speech survives First Amendment scrutiny:

> The remaining *Central Hudson* factors require that a valid restriction on commercial speech directly advance the government interest and be no more extensive than necessary to serve that interest. We have said that '[t]he last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislative's ends and the means chosen to accomplish those ends' *Posadas, supra,* at 341. . . .
>
> Just two terms ago, in *Edenfield v. Fane*, 507 U.S. __ (1993), we had occasion to explain the *Central Hudson* factor concerning whether the regulation of commercial speech 'directly advances the governmental interest asserted.' In *Edenfield*, we decided that the Government carries the burden of showing that the challenged regulation advances the

> Government's interest 'in a direct and material way.' *Id.*, at __ (slip op., at 5). That burden 'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' *Id.*, at __ (slip op., at 9).

63 U.S.L.W. at 4322. Therefore, respondent errs in arguing that *Cal-Almond I* applied the Supreme Court standard too rigidly.

Respondent next asserts that in applying the "directly advance" test, the Ninth Circuit incorrectly concentrated on the effects the Almond Promotion Program has on handlers, and ignored its benefits to growers.

If there is any confusion as to whom the Almond Order's Promotion Program is designed to assist, the confusion is caused by the program itself. Unlike the majority of other promotion programs that charge assessments to growers which handlers are merely required to collect, the Almond Order charges the assessments to the handlers. Handlers are then free to negotiate deductions for the assessments from the prices they pay growers. Some do; some do not. But irrespective of whether the grower, handler or consumer is the one who ultimately pays the assessments, the Almond Board has only collected them from those handlers who did not engage in branded advertising or other forms of approved brand related promotion. Comparison of the small amount of money actually collected and used by the Board for generic advertising and promotion out of the relatively huge amounts assessed for it, makes it abundantly clear that the

essential purpose of the program was not to engage in generic advertising and promotion, but rather to induce expenditures by all handlers equivalent, on a per kernel pound basis, to those expended by Blue Diamond for its brand advertising.[3]

The testimony by Blue Diamond's representative, Algernon Greenlee, shows that Blue Diamond's concern is that if it alone engaged in advertising and promotion, its competitors could use their lower costs to price their products below Blue Diamond and enjoy a competitive advantage. This point is reiterated at page 20 of Blue Diamond's brief. In fact, Blue Diamond regulates its spending for advertising to assure that it spends no more than the credit it receives against the advertising assessment, and thereby spends no more per pound than the amount its competitors are compelled to spend under the Order. As was found in *Cal-Almond I*, the Almond Order's Promotion Program has not stimulated additional or more effective advertising from Blue Diamond. What it has done is to require Blue Diamond's competitors to make equivalent expenditures. These competitors include the petitioners who have again testified as was done in *Cal-Almond I*, that they could more effectively market their product through methods other than those authorized as "creditable" methods for avoiding payment of the advertising assessments. Moreover, the type and level of the Board's generic advertising and promotion did not target the markets where petitioners sell their products and was of scant assistance to them.

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3. During the 1987-88 through the 1990-91 marketing years, the total expenditure by the Almond Board for advertising, promotion and public relations ranged between $840,000 to $1,400,000 per year, whereas during the same time period, Blue Diamond spent $8,000,000 to $14,200,000 per year on advertising.

Respondent has urged, however, that competing handlers benefitted whenever Blue Diamond's advertising increased its sales of almonds because that reduced the amount of almonds it had available to sell in other outlets. Therefore, respondent continues, Blue Diamond had less almonds to sell overseas and its competitors could increase their prices in accordance with the economic law of "one price" in the export market where almond demand has been inelastic. This kind of benefit is simply too remote to meet the *Central Hudson* standard. But not only did the Promotion Program fail to materially aid any of the petitioning handlers as it did Blue Diamond, it did not "directly advance" the interests of growers.

Even though Blue Diamond's "Can-A-Week" campaign may have incidentally increased consumer awareness of almonds, the same cannot be said of the "creditable" advertising and promotion by its competitors which the Promotion Program induced.

Those who could find no valid business reason for engaging in branded advertising were given credit for buying 1/2 ounce "charity packs" of almonds from the Almond Board for distribution to schools and churches. (Ex. AO1, par. 2; Tr. 406, Tr. 593, Tr. 605) Some owning little country stores received credit for advertising the stores. (Ex. HNF6, par. 2) Credit was given for billboards located in California. (Tr. 288-289) Credit was given to an almond handler for an automobile racing promotion. (Tr. 41) Credit was given for advertising in a program by "The Beautiful Ladies of Oil Wrestling" who wrestled while coated with almond oil. (Tr. 146-147) Handlers received credit for newspaper and radio brand advertisements which were of poor quality and limited success in selling almonds. (Tr. 272)

It stretches credulity to the breaking point to believe that

these forms of advertising and promotion expanded the overall market for almonds or otherwise enhanced the prices growers received for their almonds.

The only branded advertising that respondent can argue was of benefit to growers was Blue Diamond's. But Blue Diamond would have advertised even without the Almond Order. It controlled 90% of the retail market and its "Can-A-Week" campaign was directed to that market. If American consumers purchased more almonds at retail stores as a result of the campaign, Blue Diamond was the obvious, prime beneficiary. When the Almond Board contracted with Dr. Jason Christian of the Department of Agricultural Economics at the University of California-Davis, to research the impact of advertising on almond demand, the only data on advertising expenditures given him was Blue Diamond's.

Dr. Christian's study found a direct correlation between the total volume of almonds sold and the amount Blue Diamond spent each year to advertise. He concluded that the more Blue Diamond advertised, the more demand increased. The problem with this conclusion is akin to Sherlock Holmes' statement about a stick found lying on the ground being used as evidence. Looked at from one end it points in one direction; walk around it and it points in the opposite direction. Inasmuch as Blue Diamond correlated its advertising budget to the amount of its annual advertising assessment which is computed on a per pound handled basis, the amount Blue Diamond spent on advertising was obviously greater in the years when the higher volumes were sold. In other words, it may well be that higher sales volumes caused higher advertising expenditures, and not the other way around.[4]

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4. This point was made by Professor Michael K. Wohlgenant, (Cont'd)

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Moreover, Blue Diamond's "Can-A-Week" campaign was conducted wholly within the United States and was directed to the retail market. But the increases in sales of almonds in the past ten years have been principally due to increased exports and increased purchases by domestic manufacturers for ingredient use. In fact, the share of almonds going to the domestic retail market has declined. As Professor Scott Davis of the Graduate School of Management, University of California-Davis, explained (J. Pet. #1, page 8):

> Based on the advertising and promotional material I have observed, it seems unlikely that advertising of any sort stimulates the demand by ingredients buyers. The advertising that was conducted during the time period studied by Christian seems primarily targeted toward household consumption of almonds as a snack (e.g. the "Can a Week" campaign) or as ingredients in recipes. Thus if advertising has been the primary force in stimulating the demand for almonds one would expect substantial growth in the demand by the household segment and limited growth by the ingredients segment. As a result, if the advertising is effective, we would expect an increase in the share of the market which is

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(Cont'd)

Department of Agricultural and Resource Economics at North Carolina State University, in his prepared direct testimony which critiqued Dr. Christian's study. (J. Pet. #2, page 7, par. 6) Although Dr. Christian and his colleague, Professor Sexton, returned to the stand to refute Professor Wohlgenant's critical comments, neither addressed this observation.

> attributable to household consumption relative to the share attributable to demand by ingredients buyers . . . . It appears that the demand by the ingredients buyers has increased more rapidly than the demand for direct household use.

But again, even if Blue Diamond's advertising was effective in selling almonds and enhancing grower returns, the assessments charged handlers did not make that happen. Blue Diamond would have advertised its brand anyway. The branded advertising and promotion by other handlers was virtually useless. Those dollars which did end up being spent on generic advertising and promotion were too few and too poorly spent to be effective. Several witnesses called by USDA testified that, in 1991, the Board's promotional activities had not been successful in promoting almonds. (Greenlee, Tr. at 356-57; Campos, Tr. at 611; Phinney, Tr. at 2240) A study commissioned by the Almond Board showed that when consumers were asked to identify the spokesperson for almonds, only 3% correctly identified Greg LeMond and 5% mistakenly identified Sandi Duncan. (Rx 154 attachment B page 14). Ms. Gullickson, the Board's new public relations person, testified that her firm's research showed that, in 1993, people had a "nambi-pambi kind of reaction" to almonds. (Tr. at 1211) Even respondent admits, at page 50 of its brief, that prior to 1992, ". . . one cannot expect to discover a very powerful generic campaign for that time period, or very measurable effects from that generic promotion."

Under the new credit-back provisions there should now be sufficient money to fund a generic program at an effective level. To that end, the Board has prepared a tentative advertising campaign featuring monks who cannot control their appetite for almonds. Whether this contemplated campaign will enhance the

image of almonds and benefit the industry, is untested and uncertain. Respondent admits at page 63 of its brief that it "cannot be expected to produce a measurable attributable increase in almond sales at such an early stage. . . . (but it) might be expected to ultimately increase the price and/or sales of almonds." Although Ms. Gullickson's firm has been trying to improve consumer reaction to almonds, she had no evidence that her efforts have been successful. (Tr. at 1248, 1284) None of the Board's other advertising or public relations people presented any evidence that any of the Board's recent efforts have been successful in stimulating the demand for almonds. (Lundeen, Tr. at 1349, Buxton, Tr. at 1620, 1654-55)

A similar lack of evidence of the effectiveness of proposed generic advertising recently caused the United States District Court for the Eastern District of California to grant a preliminary injunction when it applied *Cal-Almond I* to the California State program for advertising apples. *See Bidart Bros. v. California Apple Comm'n*, No. CV-F-94-6018-OWW, Slip op. at 14 (D.C. Cal. Dec. 1, 1994).

In sum, under *Cal-Almond I*, USDA was required to produce evidence showing that the Almond Order's Promotion Program "directly advances" the asserted government interest, and this record lacks that evidence.

The "No More Extensive Than Necessary" Test and the Present Record

The final test under *Central Hudson* which the Almond Order's Promotion Program must meet, is the "no more extensive than necessary" test.

This test was explained in *Rubin*, 63 U.S.L.W. at 4323, as

requiring government regulation of speech to be "sufficiently tailored to its goal" else there is not a sufficient "fit". The availability of options, "all of which could advance the Government's asserted interest in a manner less intrusive to . . . (a regulated person's) First Amendment rights, indicates that the . . . (government action) is more extensive than necessary". *See Rubin*, 63 U.S.L.W. at 4323-4324.

Cal-Almond I decided that the creditable advertising regulations for determining which forms of advertising and promotion were eligible for credit were too restrictive and failed the "no more extensive than necessary" test. Specifically, *Cal-Almond I*, 14 F.3d at 440, found no logical justification for the restrictions which denied credit for ads promoting more then two complementary branded products; ads promoting a product that also has competing nuts; or ads promoting retail stores not owned by handlers.

The present record also fails to justify such restrictions which were in force under the creditable advertising program from 1986 through 1992.

Under the new credit-back program, such restrictions have been removed. But petitioners contend they are improperly being denied credit for personal selling and their travel expenses to develop new overseas markets.[5]

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5. Some petitioners also urged they should be given credit for their investments in plant equipment and for lavish client entertainment. Inasmuch as investment in plant equipment is a capital outlay incurred for many reasons other then increasing overall demand for almonds, it should neither be credited nor should the Promotion Plan be faulted for its denial. Client entertainment which in the almond industry appears to be extremely lavish, is so completely identified with the firm that provides the entertainment that competitors should not be made to participate in its cost via "credits."

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The credible evidence of record convinces me that the petitioners do not need the Promotion Program to cause them to engage in either activity. Just as Blue Diamond would advertise its almonds in the absence of the Promotion Plan, so would petitioners personally sell and travel to sell their almonds. However, inasmuch as this regulatory system allows handlers credit for branded advertising and promotion because overall sales and grower returns may be increased, it is arbitrary to deny credit to handlers for personal selling which is just as likely to accomplish that result. It is also arbitrary to deny handlers credit for their overseas travel to develop new markets when this kind of travel by Almond Board officials is reimbursed out of the handlers' assessments. For these reasons, the new credit-back program also fails the "no more extensive than necessary" test.

Freedom of Association

Cal-Almond I found it unnecessary to review the record in terms of the Supreme Court's test for permissible government restriction on Freedom of Association, "because we hold the almond marketing program unconstitutional even under the less stringent *Central Hudson* standard." 14 F.3d at 436.

In this proceeding, the same situation has occurred, and further consideration of the Freedom of Association issue is again unnecessary.

Disposition of the Petitions

The Almond Order's Promotion Program is determined not to be in accordance with law from 1986 through the present, in that it failed to directly advance and was more extensive than necessary to advance the government interest asserted in

justification of its regulation of petitioners' commercial speech. The detailed findings of fact and conclusions in support of this disposition are as follows:

Findings of Fact

A. The Petitioners

Cal-Almond

1. Cal-Almond, Inc. is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R Part 981). The Almond Order's Promotion Plan requires Cal-Almond to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Cal-Almond seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Cal-Almond for the 1992-1993 marketing year and every subsequent marketing year.

2. 65% of the almonds Cal-Almond handles are sold into the export market, and 35% into the domestic market. In 1988, Cal-Almond desired to and did expand its product lines to provide more manufactured products. Most almond handlers ship only "brown almonds" (almonds that are not manufactured), and Cal-Almond extensively increased its product lines beginning in 1988 to manufacture items that are sliced, diced and blanched. (Dryden; Ex. CA3, par. 3)

3. In 1989, approximately 50% of Cal-Almond's product was manufactured into specialty products which include

blanched, sliced, diced and super premium brown almonds. In 1993-1994 Cal-Almond had increased the amount of almonds it handled to approximately thirty million pounds; approximately 80% of these almonds were manufactured into specialty products. For the 1994-1995 crop year, Cal-Almond anticipates handling approximately forty million pounds with approximately 80% of that product being manufactured into specialty products. (Dryden; Ex. CA3, par. 3)

4. It is also important to Cal-Almond to develop a reputation among buyers and customers of being able to produce its products, in a timely manner and at competitive prices, which are used in the manufacture of ice creams, cereals, bakery goods, candy bars and other confectionery items. (Dryden; Ex. CA3, par. 5)

5. Cal-Almond, at considerable expense, has so successfully developed the Cal-Almond label, that many buyers and brokers have called Cal-Almond at the urging of an end user who wants the Cal-Almond label because of its assurance of quality, timeliness of shipment and competitive price. (Dryden; Ex. CA3, par. 5)

6. In 1988, Cal-Almond sold its manufactured and specialty items, at 2-5 cents less per pound than Blue Diamond's price to customers. Today, buyers are willing to pay more for Cal-Almond's product than Blue Diamond's product. (Dryden; Ex. CA3, par. 5)

7. In 1988, Cal-Almond expanded its facilities to house newly purchased manufacturing equipment that included blanching units and all the cutting units to make the product into sliced and diced type almonds. The cost of that equipment was in

excess of one million dollars, plus the cost of the propane tanks to heat the blanching water, plumbing, recycled water systems and meeting the necessary permit requirements of the county. (Dryden; Ex. CA3, par. 6)

8. Since 1988, Cal-Almond has expanded its roasting trade from pure "oil" roasting to dry roasting, because several of Cal-Almond's buyers in the bakery and candy bar trade desired dry roasted almonds; and in 1992 Cal-Almond purchased dry roasting equipment for $200,000.00. (Dryden; Ex. CA3, par. 6)

9. Cal-Almond has spent approximately $500,000.00 for additional equipment for a blanching, slicing and dicing unit to supply greater quality assurance for the customer's specifications. In the summer of 1994, Cal-Almond spent approximately $150,000.00 for the most modern dicing unit, again to meet buyer specifications and at the customer's request. (Dryden; Ex. CA3, par. 6)

10. Cal-Almond spent an additional $350,000.00 for additional cold storage warehousing so that Cal-Almond would have the extra ability to market almonds throughout the crop year. (Dryden, Ex. CA3, par. 6)

11. Being able to market throughout the crop year allows Cal-Almond to take advantage of the highest prices during the crop year without being "forced to sell" at an earlier time or during times when the market price is lower. (Dryden; Ex. CA3, par. 6)

12. In the summer of 1994, Cal-Almond spent an additional one million dollars to improve and expand its shelling line, and an additional warehouse was being built at the time of the hearing at an expense of $150,000.00. (Dryden; Ex. CA3, par. 6)

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13. In 1994, Cal-Almond also put in an LMC precleaning and cleaning line at the cost of $350,000.00, and did so because that line is the "Cadillac" of that equipment. This was done in order to meet the certification requirements of all the major domestic and export buyer specifications, which are extremely rigid. (Dryden; Ex. CA3, par. 7)

14. During tours that Dryden facilitated for visiting buyers, brokers arid customers, the buyers would suggest added safeguards and extra "cleanliness" developments, stating that they would be interested in purchasing more product from Cal-Almond if it was able to add this extra equipment. Cal-Almond complied with these requests. (Dryden; Ex. CA3, par. 7)

15. As the result of a buyer request, Cal-Almond put in new flooring in one of its buildings for $75,000.00, and it expanded the floor space of its roasting operation in order to allow the loading and unloading of almonds without the almonds facing the elements from outside. In order to meet further buyer specifications, Cal-Almond added eight more electronic sorting machines at approximately $40,000.00 per machine to increase the quality of its product. (Dryden; Ex. CA3, par. 7)

16. Cal-Almond's Quality Assurance and Production Manager, Bill Dryden has spent approximately 30% of his time with buyers and customers. He has conducted tours of Cal-Almond's facilities for buyers and customers; reviewed their rigid specifications for products, and make adjustments for purchasers in order to comply with their specifications. When these customers arrive, Cal-Almond lavishly entertains them. The customers are flown in Cal-Almond airplanes to Yosemite National Park, taken to breakfast, lunch and dinners and otherwise fully hosted at Cal-Almond's expense. (Dryden; Ex. CA3, par. 8)

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17. At least once a year, Dryden and Tyler Angle, an officer of Cal-Almond and the overall manager of Cal-Almond, travel to Europe and other places in order to meet with the customers, buyers and brokers, and Cal-Almond has found that these visits are particularly valuable in promoting the Cal-Almond product and promoting almonds in general. (Dryden; Ex. CA3, par. 8)

18. Dryden is constantly on the telephone to buyers and customers to promote Cal-Almond's product, listen to the concerns of buyers and customers and provide assurances that Cal-Almond can continue to meet buyer specifications. These are extremely important to Cal-Almond's promotion of its almonds. Cal-Almond has upgraded its computer systems at considerable expense to accommodate customer shipping and label making. (Dryden; Ex. CA3, par. 8)

19. Historically, foreign and domestic buyers of almonds would buy almonds in their brown natural state, and those buyers and customers would blanch, slice, dice and otherwise manufacture the almonds for resale or use in ingredient products. By virtue of Cal-Almond's expensive quality control efforts and equipment and its one-on-one salesmanship, Cal-Almond now provides that service which has increased Cal-Almond's profits. (Dryden; Ex. CA3, par. 9)

20. Buyers have learned as a result of Cal-Almond's special expertise, quality control and equipment, that Cal-Almond, using its own facilities and machinery, can provide those buyers and customers with a better product than the buyers and customers can with their own manufacturing equipment. It has taken a great deal of time and money to convince the buyers and customers to utilize Cal-Almond's services, but that is one of the reasons Cal-Almond has increased the tonnage that it

manufactures from approximately 50% in 1989 with far less tonnage, to approximately 80% now with far more tonnage. (Dryden; Ex. CA3, par. 9)

21. None of the expenditures for equipment, product enhancement or personal selling to the customers can be approved for credit under the Board's advertising program, either under the creditable advertising program or the credit-back program. (Dryden; Ex. CA3, par. 9)

22. Dryden has worked with customers to develop new products and new manufacturing techniques in order to provide the buyers and customers with even more alternatives for almonds. (Dryden; Ex. CA3, par. 9)

23. If Cal-Almond were to assist one of its customers or buyers in advertising a product containing almonds, Cal-Almond could only receive credit on that advertisement up to the amount of the net weight of the almonds in the packages, which on most occasions is less than 10% of the net weight, even though almonds being bought as ingredient items in other products has caused the increase in the demand and consumption dramatically over the years. (Dryden; Ex. CA3, par. 10)

24. Cal-Almond believes that its buyers and customers are not interested in television, newspaper, magazine or radio advertisement; they want personal service, quality product, and new techniques for making more types and cuts of almonds and meeting the buyer's specifications. (Dryden; Ex. CA3, par. 11)

25. If the Almond Order's Promotion Program did not exist, Cal-Almond would continue to promote its product in the method and manner described in the preceding paragraphs, but

would have more money for it if not required to pay advertising assessments of anywhere from $400,000.00 to $600,000.00 per year.

26. There is no method of advertising or promotion available to Cal-Almond for which Cal-Almond could receive credit under the Almond Board regulations which Cal-Almond believes is to its benefit. (Dryden; Ex. CA3, par. 12)

27. Because of Cal-Almond's quality and reputation, many customers want Cal-Almond's product and label more than they want their own private label, and some of the buyers have Cal-Almond provide them with twenty-five and fifty pound containers bearing the customer's private label when the customer must utilize its own private label. (Dryden; Ex. CA3, par. 13)

28. There are several individuals at Cal-Almond who are constantly on the telephone with buyers and customers or meeting with buyers and customers to increase almond sales. (Dryden; Ex. CA3, par. 13)

29. Under the new credit-back rules, if Cal-Almond's assessment is $400,000.00, Cal-Almond would have to spend $600,000.00 in order to receive that credit, but the available forms of advertising and promotion under the current marketing order rules are in Cal-Almond's opinion, a complete waste of money to Cal-Almond. (Dryden; Ex. CA3, par. 13)

30. For the 1992-1993 crop year, Cal-Almond's creditable advertising assessment was $366,431.83. (Ex. CA2)

31. Cal-Almond's credit-back advertising assessment for the 1993-1994 crop year was $288,440.30. (Ex. CA1)

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32. Although Cal-Almond's Purchasing Agreements specify that the advertising assessments are to be deducted from its payments to growers, its controller has testified that since at least July of 1991, Cal-Almond has not deducted the Almond Board advertising assessment from any of its growers' returns. (Nunes (controller of Cal-Almond, Inc.); Tr. 1937-1939 and Ex. CA5, page 3)

33. From 1990-1992, when Dr. Young was a food technologist for Dreyers Ice Cream (Tr. Young 1406-1407), Dreyers never received any promotional material from the Almond Board. (Tr. Young 1432)

34. Because of Dreyers stringent quality control requirements, out of all the handlers that attempted to supply Dreyers, only Cal-Almond was chosen. (Tr. Young 1433-1436, 1437-1438)

35. The percent of almonds in Dreyers ice cream runs 3%-6%. (Tr. Young at 1435)

36. The three Dreyers ice creams that contain almonds are extremely good sellers for Dreyers, and those specific varieties are not advertised. (Tr. Young 1438-1439)

37. Dreyers' director of quality assurance visited all of the plants that were in contention for the Dreyers business, in order to verify compliance with Dreyers' specifications. (Tr. Young 1440-1441)

38. Clyde Angle, president of Cal-Almond, Inc., has been a grower of almonds all of his life and has been a handler for twenty years. (Tr. Angle 2164-2166) He believes that Cal-

Almond was able to grow so fast because it kept its growers happy, and because of its personal service to its buyers. (Tr. Angle 2167-2168)

39. Cal-Almond has also developed an almond flour, which the Almond Board never advertises. Cal-Almond developed its own buyers for almond flour, and has developed a sizeable market for almond flour. (Tr. Angle 2169-2170)

40. Cal-Almond runs its blanching operation 365 days a year around the clock to keep up with the demand for Cal-Almond blanched products. (Tr. Angle 2171-2172)

41. Mr. Angle further testified that for the twenty years that Cal-Almond has been in business, there has been only one year that Cal-Almond did not pay its growers more than Blue Diamond paid theirs. (Tr. Angle 2174) Cal-Almond loans money to growers at a lower interest rate than offered by banks, and also loans money to growers who cannot, for credit reasons, borrow money needed to stay in business. In 1993-1994, he testified that Cal-Almond loaned growers in excess of five million dollars in order to keep them in business. (Tr. Angle 2174-2175) He further testified that numerous buyers and government officials have, after observing Cal-Almond's plant, told him that its plant is the cleanest operation in the industry. (Tr. Angle, 2177) In Mr. Angle's opinion, none of the ways the Almond Board allows a handler credit against the advertising assessments would be beneficial to Cal-Almond. If the Almond Board did not have advertising regulations, Cal-Almond would, Mr. Angle testified, continue to promote its product, and would have more money to do so. (Tr. Angle 2184-2185)

Treehouse Farms, Inc.

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42. Treehouse Farms, Inc. is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Treehouse Farms to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Treehouse Farms seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Treehouse Farms for the 1986-1987 marketing year and every subsequent marketing year.

43. Treehouse is a mid-sized almond handler that sells virtually all of its almonds for use as ingredients in other products. Treehouse does not sell any retail products. (Fitzgerald; Ex. TREE9, par. 2)

44. Treehouse's sales are effectuated through almond brokers to manufacturers of products that use almonds as ingredients; and Treehouse is therefore in the almost identical marketing situation as Cal-Almond, Inc., which is one of Treehouse's competitors. (Fitzgerald; Ex. TREE9, par. 2)

45. Approximately 80% of Treehouse's sales are sold into the foreign market. Treehouse's foreign sales have risen dramatically, whereas its domestic sales have risen only gradually. (Fitzgerald; Ex. TREE9, par. 3; Fitzgerald; Ex. TREE5)

46. Treehouse opposes the Almond Board's generic advertising program and views the Board's program as having had no value to Treehouse. (Fitzgerald; Ex. TREE9, par. 4)

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47. Treehouse believes that what sells its almonds is a fair price, Treehouse's efforts to contact customers, visiting potential customers at their facilities throughout the United States and overseas, showing Treehouse's facilities to potential customers, encouraging potential customers to visit Treehouse's facilities, and creating new and improved products by investing in new and improved technologies and quality control, none of which is assisted by the Board's generic advertising and promotional efforts. (Fitzgerald; Ex. TREE9, par. 4; Carey; Ex. TREE10 par. 2)

48. In Treehouse's opinion, none of its efforts to sell its product are assisted at all by the Board's creditable advertising program or the new credit-back program, and Treehouse cannot receive credit for its expenditures prior to 1993 that it believes promoted the sale of its almonds. (Fitzgerald; Ex. TREE9 paras. 4 & 5)

49. Prior to 1993, Almond Board regulations did not permit Treehouse to receive any credit for advertising products that contain Treehouse almonds (such as candy or cereal). Moreover, the manufacturers that sell these candies and cereal know how to advertise their products better than Treehouse would, and Treehouse's customers already know that they want to purchase almonds, but the most important question for them is whether Treehouse can deliver quality almonds at a fair price. (Fitzgerald; Ex. TREE9 par. 5)

50. In Treehouse's opinion, the Almond Board's generic print advertising (Fitzgerald; Ex. TREE7) does not help sell Treehouse's almonds, and the branded forms of advertising available under the regulation would have a minimal effect, if any, on Treehouse's sales because of the nature of Treehouse's business. (Fitzgerald; Ex. TREE9 par. 6)

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51. Treehouse does minimal "advertising" but for name recognition purposes only. Treehouse does not believe this advertising has had any value to Treehouse in identifying potential new customers. (Fitzgerald, Ex. TREE9 par. 7)

52. The amount of advertising assessment Treehouse has paid to the Almond Board for the crop years 1986 through the 1993-94 crop year are contained in Fitzgerald; Ex. TREE6 and TREE8, except for the 1987-1988 crop year, which Treehouse assumes the Almond Board would have. (Fitzgerald; Ex. TREE9 par. 8)

53. When almond prices went up substantially in 1993, many buyers expressed to Treehouse that if the high prices continued in that range, they would consider removing almonds from their products as ingredients. (Tr. Fitzgerald 71)

54. Although Treehouse's Purchasing Agreements specify that the advertising assessments are to be deducted from its growers, its president testified that Treehouse does not deduct advertising assessments from its growers returns, and has not from and including the 1987-88 crop year through the current crop year. (Tr. Fitzgerald 81-84, 87-88; Ex. TREE 11)

55. In Treehouse's opinion, as stated by its president, generic advertising by the Almond Board does not increase the consumer demand for almond products; what sells almonds is packers spending time with their customers and talking to the research and development departments of those customers. (Tr. Fitzgerald 115; Carey Ex. TREE10, par. 2)

56. Treehouse has developed a new product that is a special slivered almond that is sold into Japan for a dried fish product,

and the Japanese customers have expanded their business into that product which has sold more almonds, and Treehouse has spent funds to accommodate the Japanese buyer in this endeavor. (Tr. Fitzgerald 116-117)

57. Treehouse does not consult with the Almond Board or any public relations or advertising committee or with their growers as to how Treehouse should market its almonds, because Treehouse knows best how to market its almonds. (Tr. Fitzgerald 125)

Gold Hills Nut Company, Inc.

58. Gold Hills Nut Company, Inc. is a handler of California almonds and subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Gold Hills to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Gold Hills seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Gold Hills for the 1992-1993 marketing year and every subsequent marketing year.

59. Bill Phipps is the president, chief financial officer and owner of Gold Hills Nut Company, Inc. which began handling almonds in 1986. (Phipps; Ex. GH3, par. 1)

60. For the 1992-93 crop year, Gold Hills handled 5,632,793 pounds of almonds, and all of it was sold into the export market. (Phipps; Ex. GH3, par. 3; GH1)

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61. For the 1993-94 crop year, Gold Hills handled 9,997,462 pounds of almonds and 100% of that product was exported. (Phipps; Ex. GH3, par. 3; GH2)

62. Approximately twenty per-cent of Gold Hills' crop that it handles is owned by Phipps. (Phipps; Ex. GH3, par. 3)

63. For the 1992-93 crop year, almost all of Gold Hills creditable advertising assessment was spent buying 1/2 ounce packages of almonds from the Almond Board to be distributed to schools and churches. Gold Hills bought them in order to receive the "credit" under the advertising regulations, but they did not at all promote consumption of almonds nor increase Gold Hills' returns nor the returns to its growers. (Phipps; Ex. GH3, par. 4)

64. In Mr. Phipps' opinion, the expenditure of the advertising assessment was a complete waste of money to Gold Hills. (Phipps; Ex. GH3, par. 4)

65. For the 1994-95 almond crop year, Gold Hills will handle approximately fifteen million pounds. In 1994 Gold Hills spent approximately one and a half million dollars on equipment specifically designed to provide high quality manufactured items to compete in the export market with Spanish manufactured products, and Gold Hills will spend substantial sums of money targeting those buyers who had previously bought Spanish manufactured products. It will cost Gold Hills a substantial sum of money targeting those buyers, but neither the equipment purchases nor the expenditures to target those buyers are creditable under the credit-back rules or the previous creditable advertising rules. (Phipps; Ex. GH3, par. 5)

66. Domestic brand advertising does nothing for Gold Hills

since Gold Hills does not sell in the domestic market, and Gold Hills does not have a "brand" that goes on store shelves, but instead sells all of its almonds to be used in ingredient items. (Phipps; Ex. GH3, par. 6)

67. Over the last three years Gold Hills has, at its cost, entertained a number of buyers and customers who have come to the Gold Hills facility so that Gold Hills can prove to those customers that Gold Hills can provide the best quality product possible with timely shipments and excellent service. None of those expenditures are creditable under the Board's advertising program. (Phipps; Ex. GH3, par. 6)

68. Gold Hills believes that its buyers overseas know what the best markets are for the products containing almonds, and they are not interested in any Almond Board advertisement. (Phipps; Ex. GH3, par. 6)

69. The new credit-back program has expanded the ways in which a handler may receive credit, but Gold Hills believes the new regulations to be even more burdensome in that a handler can receive only two-thirds credit for its advertising and promotion. (Phipps; Ex. GH3, par. 7)

70. Gold Hills believes it knows best how to market its product in its own targeted market; that the competitive returns that Gold Hills has paid its growers have not been caused by any Almond Board advertising program; and that if the advertising program did not exist, Gold Hills could make more money and could pay its growers more money. (Phipps; Ex. GH3, par. 7)

71. Gold Hills does not charge its growers for the Almond Board assessments. (Phipps; Ex. GH3, par. 3; GH4 through GH9; Tr. Phipps 1911-1913)

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72. Gold Hills does not only contact buyers that already buy almonds; Gold Hills has contacted customers that have not previously bought almonds, and has been able to provide new customers with the type of product those customers wanted. (Phipps 1916-1918)

73. Gold Hills has always paid its growers more money per pound than Blue Diamond pays theirs. (Tr. Phipps 1923-1924)

74. A number of growers have brought product to Gold Hills because Gold Hills is fighting the advertising program. (Tr. Phipps 1926-1927)

75. Gold Hills has also slightly discounted its price to buyers overseas who advertise the product which is made from its almonds. Gold Hills believes this to be a good investment because the buyer will buy more of Gold Hills' product when consumption increases as a result of the buyers' specific advertising program, but this discount is not creditable under the advertising regulations. (Tr. Phipps 1929-1931)

Frazier Nut Farms, Inc.

76. Frazier Nut Farms, Inc. is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Frazier Nut to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Frazier Nut seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Frazier Nut, for

the 1992-1993 marketing year and every subsequent marketing year.

77. Jim Frazier is the president of Frazier Nut Farms, Inc., an almond handler, which in 1992 handled 1,290,912 pounds and for the 1993-94 crop year handled 870,010 pounds. (Frazier; Ex. FN3, par. 1, FN1 & FN2)

78. Frazier sells brown almonds and most of its products are exported. Frazier finds that the best way to promote its product is to meet with buyers, have one-on-one sales meetings with those buyers and make plant improvements. (Frazier; Ex. FN3, par. 2)

79. Frazier is a much larger walnut processor than it is an almond processor, but many of Frazier's buyers buy both. Under the 1992-93 creditable advertising assessment, Frazier could not obtain credit for promoting almonds along with "competing nuts", which would include walnuts. (Frazier; Ex. FN3, par. 2)

80. Under the new credit-back rules, which restricts credits to two-thirds of the amount spent, a handler can receive credit for the promotion of both walnuts and almonds, but the amount of the credit is further reduced to the percentage of the net weight of the product containing almonds. (Frazier; Ex. FN3, par. 2)

81. In Mr. Frazier's opinion, neither the Almond Board, USDA, nor competitors sitting on the Almond Board know how to promote Frazier's product, and none of the Board's promotion or advertising assists Frazier's sales. (Frazier; Ex. FN3, par. 2)

82. If there were no Almond Board advertising

assessments, Mr. Frazier states he would utilize that amount of money to increase the quality control of its product, and expand the types of products that Frazier could process to increase his customer base. (Frazier; Ex. FN3, par. 2)

83. Mr. Frazier believes that advertising in magazines, radio, TV or newspapers would not help Frazier whatsoever to promote its products, as Frazier has no "store shelf' almonds, but sells its products to buyers who use the almonds as ingredients in other commodities. (Frazier; Ex. FN3, par. 2)

84. Mr. Frazier further testified that in his opinion, for every dollar Frazier has to spend on the Board mandated advertising program, not only does it lose that dollar because there is no benefit to Mr. Frazier from the Board's promotion programs, but it also loses the profits it could make on that dollar if spent on the ways that would increase the sale of its almonds; however none of those ways would be creditable under the Board regulations. (Frazier, Ex. FN3, par. 2)

85. Frazier does not deduct Almond Board assessments from its payments to growers. (Frazier Tr. 212)

86. Mr. Frazier believes that Almond Board generic advertising directed to the export market is of no benefit to Frazier because Frazier can sell everything that Frazier handles without any advertising. He testified that Frazier has more inquiries and more interest in its product than Frazier can possibly supply. (Tr. Frazier 213)

87. Mr. Frazier further believes that the Frazier name itself generates the interest in product, not advertising. (Tr. Frazier 214-215)

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Beard's Quality Nut Company

88. Beard's Quality Nut Company is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Beard to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Beard seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Beard, for the 1986-1987 marketing year and every subsequent marketing year.

89. Steve Beard is the manager of the almond division of Beard's Quality Nut Company, an almond handler since 1969, and was the chairman of the public relations and advertising committee for the Almond Board for the preceding two years. (Beard BQN12, par. 1)

90. Mr. Beard testified that the public relations and advertising committee and the Almond Board consist of both growers and handlers, but growers do not know how to market almonds, yet they vote on the Board and at the public relation committee meetings with respect to where Almond Board money should be spent on advertising and promotion. (Beard BQN12, par. 1)

91. From 1986 to the present, Beard spent its creditable advertising assessment dollars and its credit-back dollars, not because Beard believed that it was of any benefit spending the money under the very restrictive creditable advertising regulations or the new credit-back advertising regulations, but

because if Beard did not spend the money it would be paid to the Board, and the Board would then spend the money advertising almonds as snacks to consumers, which benefitted Blue Diamond, not Beard. (Beard BQN12, par. 2)

92. Beard has no store shelf almonds for snacks or baking, but instead its almonds are marketed throughout the world, approximately 70% going to the foreign market and 30% to domestic sales, all as whole brown almonds used as ingredients. (Beard BQN12, par. 2)

93. In Steve Beard's opinion, none of Beard's compelled expenditures of dollars for advertising benefitted Beard or its growers, it only cost Beard money. (Beard BQN12, par. 2)

94. Beard has spent an enormous amount of time and money for which it could not receive credit either under the creditable advertising rules or the credit-back rule. These expenditures included personal contact with many customers and direct mailing to those customers. Beard also attempted to influence domestic customers to adjust their promotions to fit the Almond Board's rules of joint advertising, but its efforts were hampered in that the advertising regulation precluded credit for joint advertising if the products included "competing nuts" or did not make up at least 50% (fifty percent) of the net weight of the package, or if Beard's own label was not on the package. (Beard BQN12, par. 3)

95. In almost all of the years at issue (1986-87 through the 1994-95 crop years), the compelled advertising assessment to Beard was anywhere from $50,000.00 per year to over $100,000.00 per year, and, in Steve Beard's opinion, none of those expenditures benefitted Beard. (Beard BQN12, par. 3)

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96. During this same period of time Beard has spent a substantial sum of money improving its facilities, purchasing new equipment, purchasing new facilities and increasing the efficiency level and the quality of Beard's product so that it would open more markets to Beard, but the sums of money spent are not creditable under the Board's regulations, even though said expenditures have improved dramatically the marketability of Beard's almonds. (Beard BQN12, par. 3)

97. Steve Beard testified that if Beard did not have to spend money on the Almond Board's programs, it would be used for personal contact with buyers with follow-up promotional materials, ideas to tailor the customer's product with available types of almonds, working on quality line extensions at Beard's facility in order to produce a product that would appeal even more to the industrial users and customers; Beard sponsored seminars; and more travel to meet more buyers. Beard would also have more buyers and users hosted at Beard's facility. None of these forms of expenditures is creditable under the advertising regulations. (Beard BQN12, par. 5)

98. In Steve Beard's opinion, Beard has received absolutely no economic benefit from the advertising program from and including 1986 to the present, (the years under challenge by Beard) but instead it has cost Beard hundreds of thousands of dollars. (Beard BQN12, par. 9; Tr. Beard 176)

99. Beard's credit-back advertising assessment, its creditable advertising assessments and its administrative assessments for the 1989-90 crop year through the 1993-94 crop year are set forth in exhibits BQN8 through BQN10.

100. Beard does not deduct assessments from its grower returns. (Tr. Beard 134-136)

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Monte Cristo Packing Company

101. Monte Cristo Packing Company is a handler of California almonds and subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Monte Cristo Packing Company to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. *Monte Cristo* seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Monte Cristo Packing Company for the 1986-1987 marketing year[6] and every subsequent marketing year.

102. Theron Shamgochian is the president of Monte Cristo Packing Company. Mr. Shamgochian supplied a written declaration which was to be used as his direct testimony that would be subject to cross-examination at the oral hearing. However, Mr. Shamgochian became personally unavailable and did not take the witness stand. His statement (Ex. MC8) was received an evidence but it is unsworn and was not subject to cross-examination. In it he asserts a claim not only to all advertising assessments paid since 1980 but also to that portion of the administrative assessment which he asserts was used by the Board for advertising and promotion. Inasmuch as his attorney has proposed that refunds should start with the 1986-87 year, and there is no sworn testimony to support redress for prior years, Monte Cristo's claim is being limited to the period 1986-87 to present. There is insufficient evidence to support

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6. *See* footnote 1 *supra*.

petitioner's claim that a portion of the administrative assessments were partially applied to advertising and promotion by the Board and should therefore also be eventually refunded[7]. During the creditable marketing years of 1986-1987, through 1991-1992, the opposite was true; a portion of the advertising assessments was applied to reduce subsequent administrative assessments. Other than Mr. Shamgochian's unsworn statement which was not subjected to cross-examination, there is no credible evidence in this record that any part of the administrative assessments were applied to advertising and promotion by the Board. For these reasons, these proposed findings by Monte Cristo have been rejected. The following findings, however, concerning Monte Cristo's general operating practices and the billings it received for advertising assessments from the 1986-1987 marketing year to present, have been made on the basis of Mr. Shamgochian's written declaration and the documents attached to it.

103. Monte Cristo sells all of its almonds for ingredient purposes. It sells a substantial amount of its product in Japan, Hong Kong, Korea, Macao and Mexico.

104. The Almond Board does not advertise in Mexico, and Monte Cristo's costs to enter that market were not creditable under either the credit-back or the former creditable advertising rules.

105. Mr. Shamgochian, his son and other representatives of Monte Cristo frequently travel overseas to Europe, Russia,

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7. Several other petitioners have made similar claims against the administrative assessments they paid, but those claims are also found to be unsupported by evidence that part of those assessments were used to pay for generic advertising and promotion.

Japan and Korea to meet with potential customers, and none of those travel expenses were creditable under the Almond Order's Promotion Plan.

106. Monte Cristo engages in lavish client entertainment which includes the hosting of a golf tournament in Japan; the annual hosting, since 1984, of a golf tournament and dinner in America for the entire almond industry, which includes growers, packers, brokers, exporters, importers, candy industry representatives and foreign users; supplying private airplanes. limousines and private automobiles to visiting almond buyers and paying the cost of their stay in California; and providing vacation stays for brokers, importers and users.

107. Monte Cristo has spent over two million dollars in the last ten years on plant improvements in respect to its huller, sizing operation, electronic color sorters, length graders, picking rooms and cold storage facilities, so that Monte Cristo could be certified by all major domestic candy manufacturers, including M&M Mars, Hershey Chocolates, Sees Candies, Russell Stover and Banner. The expenses for these capital improvements are not creditable under the Almond Board's regulations.

108. If the Almond Order's Promotion Program were discontinued, Monte Cristo would continue to promote its product.

109. For 1986-87, Monte Cristo's creditable advertising assessment was as follows:

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12,762,031 kernel pounds	
at 2 1/2 cents per lb:	$319,050.77
Credit was given for:	$290,584.35
Balance actually paid to Board:	$ 28,466.42

110. For 1987-88, Monte Cristo's creditable advertising assessment was as follows:

33,616,080 kernel pounds	
at 2 1/2 cents per lb:	$840,402.00
Credit was given for:	$840,402.00
Balance actually paid to Board:	- 0 -

111. For 1988-89, Monte Cristo's creditable advertising assessment was as follows:

36,407,188 kernel pounds	
at 2 1/2 cents per lb:	$910,179.70
Credit was given for:	$910,179.70
Balance actually paid to Board:	- 0 -

112. For 1989-90, no almonds handled that marketing year.

113. For 1990-91, Monte Cristo's creditable advertising assessment was as follows:

5,496,879 kernel pounds	
at 2 1/2 cents per lb:	$137,421.98
Credit was given for:	$137,361.91
Balance actually paid to Board:	$ 60.07

114. For 1991-92, Monte Cristo's creditable advertising assessment was as follows:

8,123,862 kernel pounds	
at 1 3/4 cents per lb:	$142,167.59
Credit was given for:	$142,167.59
Balance actually paid to Board:	-0-

115. For 1992-93, Monte Cristo's creditable advertising assessment was as follows:

8,870,776 kernel pounds	
at 1 1/4 cents per lb:	$110,884.70
Credit was given for:	$110,884.70
Balance actually paid to Board:	-0-

116. For 1993-94, Monte Cristo's credit-back advertising assessment was based on 11,015,717 kernel pounds handled at a rate of 1 cent per pound. This totaled $110,015,717. How much credit was given against this amount and how much was actually paid to the Board has not been shown.

Amaretto Orchards

117. Amaretto Orchards is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Amaretto Orchards to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Amaretto Orchards seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Amaretto Orchards for the 1986-1987 marketing year and every subsequent marketing year.

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118. Bruce Beretta is a general partner of Amaretto Orchards, which became a handler of almonds during the 1986-1987 season. Amaretto Orchards handles between approximately 1 million pounds to approximately 1.8 million pounds, and only markets its own tonnage grown. (Beretta AO1, par.1; Beretta, Tr. 1954-1956)

119. Approximately 70% of Amaretto's product is exported; it has no retail brand; it sells brown almonds to be used as ingredients in manufactured products. (Beretta AO1, par. 1)

120. Mr. Beretta assumes that the Almond Board has records of the tonnage and assessment amounts paid by Amaretto Orchard from the 1986-87 season through the 1993-94 crop year. (Beretta AO1, par. 1)

121. From 1986 through the 1992-93 crop year, when the creditable advertising program, was in effect, Amaretto typically purchased half ounce packages of snack almonds from the Almond Board to give them to charities so that Amaretto could receive 150% credit for those purchases pursuant to the Board's regulations, but the distribution of the charitable packs did not promote Amaretto's returns nor did it increase buyer demand for Amaretto's product. (Beretta AO1, par. 2)

122. Mr. Beretta testified that, on a couple of occasions, Amaretto Orchards did do some "advertising" pursuant to the Almond Board regulations. However, Amaretto would not have engaged in this "advertising", but for the Promotion Program. In Mr. Beretta's opinion, there was no creditable activity under the Program which would effectively promote or advertise Amaretto's product. (Beretta AO1, par. 2)

123. Mr. Beretta further testified that in his opinion, not only was every dollar spent on advertising and promotion pursuant to the Almond Board's regulations lost as such, but also it left Amaretto with one dollar less to spend in ways that would promote its product. (Beretta AO1, par. 2)

124. Amaretto believes that the best way to promote its product is direct one-on-one salesmanship with buyers and customers; bringing buyers to its plant, entertaining the buyers while visiting its plant, and by travel overseas by Amaretto's representatives to promote its product. (Beretta AO1, par. 3)

125. Mr. Beretta testified that he has concluded that the Almond Board's generic advertising and promotion program has not assisted Amaretto, and that its payment to the Almond Board for its generic program is a complete waste of money. He further stated that Amaretto Orchards knows how to promote its product, not the Almond Board nor USDA, and if Amaretto had the money instead of having to pay it to the Almond Board, Amaretto would first use it to increase the quality control system at its facility in order to expand the number of potential buyers of its product. (Beretta AO1, par. 3)

126. On past occasions Amaretto paid the money directly to the Board for the creditable advertising assessment, in an attempt to take advantage of the 150% credit for early payments to the Board, but the Board primarily used the money for a promotional program which was geared towards advertising consumer retail almonds, a market which Amaretto did not have. (Beretta AO1, par. 3)

127. Mr. Beretta testified that in his opinion, under the current credit-back regulations, there is no permissible form of

promotion and advertising that would do Amaretto any good and be economically beneficial to Amaretto. (Beretta AO1, par. 3)

Del Rio Nut Company

128. Del Rio Nut Company is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Del Rio Nut Company to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Del Rio Nut Company seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Del Rio Nut Company for the 1986-1987 marketing year and every subsequent marketing year.

129. David Arakelian is the president and chief executive officer of Del Rio Nut Company and since 1987 has been a handler of almonds. (Arakelian DRN3, page 2)

130. The principal markets for Del Rio's almonds are food manufacturers and export organizations. Del Rio has no retail sales. (Arakelian DRN3, page 2)

131. Del Rio's creditable advertising assessment for the crop years 1987-88 through the 1992 crop year are stated at page 2, exhibit DR3.

132. Mr. Arakelian testified that the forms of credit available under the Almond Board regulations were, in his opinion, of no benefit to Del Rio, and did not compensate Del Rio

for the direct contact with buyers that has been the most useful form of marketing and selling Del Rio's almonds. (Arakelian DRN3, page 3)

133. Mr. Arakelian further testified that he believed that the forms of credit allowed under the new credit-back program have not been sufficiently expanded to provide any significant business benefit to Del Rio. He perceives the individual efforts of Del Rio in marketing its own almonds to be the way that has most effectively expanded the demand for its product rather than advertising under the regulations. (Arakelian DRN3, pages 3 and 4)

134. For the 1993-94 crop year, Del Rio's advertising assessment was $42,168.05. Mr. Arakelian testified that in his opinion, there are no forms of advertising and promotion allowable under the credit-back rules that would allow Del Rio to effectively spend that money. (Arakelian DRN3, page 4)

135. Del Rio does not charge most of its growers any of the assessments imposed by the Almond Board and USDA. However, in respect to some 5% of the tonnage it handles, Del Rio does custom processing on consignment, and does charge those growers the assessments. (Arakelian Tr. 196, 199)

136. Del Rio's promotion consists of Mr. Arakelian selling the positive qualities of the Del Rio company and its product to its customers. Mr. Arakelian personally visits customers, and has customers visit the Del Rio facility, and on one occasion he flew 4,000 miles to visit a company which was involved in importing associated products, but was not at that point bringing in almonds. (Arakelian Tr. 201-202)

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Monte Vista Farming

137. Monte Vista Farming is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Monte Vista Farming to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Monte Vista Farming seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Monte Vista Farming for the 1986-1987 marketing year and every subsequent marketing year.

138. James Crecelius is the sole owner of Monte Vista Farming Company, which since 1985, has primarily handled California almonds. The number of pounds handled by Monte Vista is stated by Mr. Crecelius at page 2 of his written declaration. (DRN4, pg. 2)

139. Monte Vista's almonds are sold to food manufacturers and export organizations and have never been sold for retail sales. (Crecelius DRN4 page 2)

140. In Mr. Crecelius' opinion, none of the forms of advertising permitted under the Almond Board regulations were of any benefit to Monte Vista in the marketing of its almonds, and since most of Monte Vista's almonds are sold in the export market the personal selling relationships with buyers is the most important aspect of selling those almonds, which is not creditable under the Board's regulations. (Crecelius DRN4 page 31; Crecelius Tr. 185-186)

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141. In the opinion of Mr. Crecelius, there is no significant business benefit for Monte Vista under the Almond Board's new credit-back regulations which took effect in the 1993-94 crop year. (Crecelius DRN4 page 3)

142. Mr. Crecelius testified that Monte Vista's individual selling efforts to its buyers is what sells Monte Vista's almonds, not advertisements taken out pursuant to the regulations. (Crecelius DRN4 page 4)

143. Monte Vista's advertising assessment for the 1993-94 crop year pursuant to the Almond Board is $65,561.87, and Mr. Crecelius believes that if Monte Vista spent that sum on the permissible forms of advertising, it would not benefit Monte Vista's sales. (Crecelius DRN4 page 4; Crecelius Tr. 184-185)

Rotteveel Orchards

144. Rotteveel Orchards is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Rotteveel Orchards to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Rotteveel Orchards seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Rotteveel Orchards for the 1986-1987 marketing year and every subsequent marketing year.

145. John Rotteveel is a partner with his father. They grow and market California almonds, and have been almond handlers since 1986. (Rotteveel RO9, par. 1)

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146. Rotteveel's advertising assessments for the 1987-1988 through 1993-1994 crop years are set forth in RO1 through RO8 and RO10. Rotteveel has misplaced the assessment notice for the 1986-1987 crop year, but assumes it to be in the Almond Board's possession. (Rotteveel RO9, par. 1)

147. Rotteveel is a small handler of almonds and 80% of its almonds is shipped into the export market, and a significant part is shipped into the Netherlands from where the Rotteveels emigrated in 1962. (Rotteveel RO9, par. 1)

148. The Rotteveels promoted their product to their buyers by bringing the buyers from those export countries to Rotteveel's orchards and the processing plant. The Rotteveels have also traveled to Europe and Latin America to meet with prospective buyers and established buyers in order to develop new buyers and maintain their existing buyers. These travel costs are substantial but not creditable under the Almond Board's regulations. (Rotteveel RO9, par. 1)

149. Mr. Rotteveel testified that he believed that if his firm did not have to pay the money to the Almond Board or spend the money on permissible forms of advertising, the Rotteveels would use it instead to increase their market by doing more direct contact with existing and prospective customers, and increasing their processing lines in order to provide more buyers with the quality and packaging that they require. (Rotteveel RO9, par. 1)

150. Most of the time Rotteveel paid the money to the Almond Board on the earlier dates in order to earn the 150% credit. Sometimes the Rotteveels spent the money pursuant to the Board's rules and regulations but when they did so, in Mr. Rotteveel's opinion, it was a complete waste of money, and had

they instead retained the money, they could have promoted their product more effectively. (Rotteveel RO9, par. 2)

151. Mr. Rotteveel believes the credit-back program to be even worse than the creditable advertising program because the handler only receives two-thirds credit towards its expenditures, and even though there are more ways to receive credit under the new program, it still does not permit credit for the types of promotion and selling activities that Rotteveel uses. (Rotteveel RO9, par. 2)

152. Mr. Rotteveel testified that because the Rotteveels are from the Netherlands, Rotteveel has a great market there. But those buyers, he believes, are not impressed with advertising, they are impressed with the quality of product that Rotteveel can ship them and the direct communication with them; all of which costs money, but none of which is creditable under the Board's regulations. (Rotteveel RO9, par. 3)

153. Mr. Rotteveel does not believe that the Almond Board's generic promotional program assists the Rotteveels in marketing their product nor does it increase the return to their growers. (Rotteveel RO9, par. 3)

154. If the Rotteveels were left with their assessment dollars instead of having to pay those dollars to the Board or spend them in wasteful ways pursuant to the Board's regulations, they could, in Mr. Rotteveel's opinion, make more money and increase the grower returns. (Rotteveel RO9, par. 3)

155. Rotteveel does not deduct the Almond Board's assessment from its grower payments. (Rotteveel Tr. 457-458)

156. In Mr. Rotteveel's opinion, because the Almond Board's generic program has not targeted any of Rotteveels' customers, they have derived no benefit from the program. (Rotteveel Tr. 462-463)

157. The Rotteveels would like to use the money that they otherwise have to spend on the advertising assessment to purchase new lines of equipment to provide buyers with specialty almond products. (Rotteveel Tr. 467-468)

158. The buyers that Rotteveel deals with in Holland have increasingly purchased more and more product from Rotteveel, and it was not because of the Almond Board advertising program. (Rotteveel Tr. 471)

Central Valley Growers Packing

159. Central Valley Growers Packing is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Central Valley Growers Packing to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Central Valley Growers Packing seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Central Valley Growers Packing for the 1986-1987 marketing year and every subsequent marketing year.

160. Robert W. Christian is the sole owner of Central Valley Growers Packing, an independent almond handler during the

crop years 1986-1987 through the 1992-1993 crop year. Exhibit CVG1 through CVG6 are the Almond Board Assessment Notices showing the tonnage handled, and the creditable advertising assessments, for the crop years 1986-87 through the 1992-93 crop year. (Christian CVG7, par. 1; CVG1 through CVG6)

161. More than 90% of Central Valley's handle during those years was exported; primarily to Europe and the Far East. During the crop years in question, the Board had no export promotional program, only a domestic program. (Christian CVG7, par. 2)

162. Mr. Christian testified that in his opinion, none of the permissible forms of advertising under the creditable advertising program were beneficial to Central Valley. Central Valley found the best way to sell its almonds to its foreign buyers was personalized service, and meeting their demanding quality requirements. (Christian CVG7, par. 2)

163. Instead of spending the money on advertising programs pursuant to the regulations which it believed would be wasteful, Central Valley just paid the advertising assessments to the Almond Board in order to receive the 150% credit payment. (Christian CVG7, par. 2)

164. Mr. Christian testified that if Central Valley Growers did not have to pay the money to the Almond Board for its almond promotion program, Central Valley Growers would have used the money to further promote its product in the export market and paid the grower a higher return, but instead, the Board's generic promotion program and the creditable advertising assessments were a complete waste of money to Central Valley. (Christian CVG7, par. 2)

165. Central Valley Growers has no retail store shelf almonds, but sells its almonds as ingredients. (Christian CVG7, par. 2)

166. In Mr. Christian's opinion, much of the Almond Board's promotional program was designed to benefit Blue Diamond, and the creditable advertising regulations were fashioned to benefit Blue Diamond, not handlers like Central Valley. (Christian CVG7, par. 2)

167. Mr. Christian testified that if Central Valley Growers had retained the approximately $40,000.00 to $60,000.00 per year that it had to pay the Almond Board for assessments for the advertising program, Central Valley Growers would have instead spent more money on product research and development in an attempt to expand Central Valley's market and increase the grower returns. It was also his opinion that neither the Board nor Blue Diamond can do a better job of promoting Central Valley Growers' product than Central Valley Growers could if left with its money to do so. (Christian CVG7, par. 2)

168. Central Valley does not deduct Almond Board assessments from its grower payments. (Christian Tr. 226-227; CVG8)

Hocker Nut Farm

169. Hocker Nut Farm is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Hocker Nut Farm to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved

by the Almond Board. Hocker Nut Farm seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Hocker Nut Farm for the 1986-1987 marketing year and every subsequent marketing year.

170. Steve Hocker is a partner with his father in Hocker Nut Farm which has been a handler of almonds from and including the 1986-87 through the 1993-94 crop year. It is a small handler, handling the pounds of almonds listed in paragraph 1 of the Hocker declaration, HNF6, with some of those assessment notices for those crop years from the Almond Board attached as HNF1 through HNF5. (Hocker HNF6)

171. Approximately 95% of Hocker's product is exported into the foreign market and Hocker only sells brown almonds, not manufactured almonds. (Hocker HNF1)

172. Mr. Hocker testified that for his firm's type of business, the best way to promote the product is one-on-one conversation and salesmanship to their buyers. (Hocker HNF6, par. 2)

173. During the time of the creditable advertising rules, on occasion Hocker would take out an advertisement advertising its little country store selling almonds, but that was a complete waste of money; once the Board approved receiving 150% credit for early payments of the advertising assessments, virtually every year Hocker paid the Almond Board the money directly in order to receive the 150% credit. (Ex. HNF6, par. 2)

174. Under the new advertising credit-back regulations, there is no way to spend the money that would, in Mr. Hocker's

opinion, assist his firm in promoting its product. If Hocker had that money, instead of having to pay it to the Board, Hocker testified he would use it to increase the efficiency of Hocker's equipment and quality, in order to open up better markets, and with improved quality could receive higher return per pound for those almonds. (Ex. HNF6, par. 2)

175. Hocker does not deduct the assessments from what it pays its growers. (Tr. 252-253)

176. Hocker sells its almonds through personal contacts, and has communicated with manufacturers that do not currently use almonds, in an effort to convince them to use almonds in their products. (Tr. 254-255)

177. In Mr. Hocker's opinion, the way the Almond Board spent the assessment money was of direct benefit to Blue Diamond who had retail store shelf almonds, not to someone like Hocker who sold almonds for ingredients. (Tr. 257-258)

178. Mr. Hocker testified that it is his belief that the more efficient Hocker can be and the better product that Hocker can turn out, the better chance Hocker has to market that product at a higher price, and pay a higher return to the grower. (Tr. 261)

Bal Nut, Inc.

179. Bal Nut, Inc. is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Bal Nut to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising

and promotion activities as specified and approved by the Almond Board. Bal Nut seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Bal Nut for the 1986-1987 marketing year and every subsequent marketing year.

180. Vito Balice is the president of Bal Nut, Inc. which was incorporated in 1989. Bal Nut is a small handler handling 150,000 to 300,000 pounds of almonds each year. 80% of its almonds are exported. (BN1, par. 1; Tr. 263-267)

181. Bal Nut believes the best way to promote its product is to travel to various countries to meet various buyers, engage in one-on-one sales efforts with those buyers, and have follow-up phone calls with those buyers; all of this is done to make the buyers feel comfortable that Bal Nut can supply the product they require. (BN1, par. 1)

182. Since 1989, Bal Nut has just basically paid the Almond Board the advertising assessments because Bal Nut could find no permissible way under the advertising regulations to use them that would actually promote Bal Nut's products. It did advertise almond butter once on radio in Wilkes-Barre, Pennsylvania, but the ad, which cost about $900.00 to air, only sold one pound of almond butter. (Tr. 272) Mr. Balice did not produce the advertising assessment notices and bills Bal Nut received, but believes that the Almond Board has records showing the amount of the advertising assessments for each of the years in question. (BN1, par. 1)

183. In Mr. Balice's opinion, Bal Nut receives no benefit whatsoever from the Almond Board's generic promotional program nor does it derive any benefit whatsoever from the

Board's creditable and credit-back advertising program. (BN1, par. 2)

184. In Mr. Balice's opinion, if Bal Nut had the money that it otherwise has to pay for the Almond Board's advertising programs, Bal Nut would install a bathroom at its warehouse and fix the roof which leaks and spend more time meeting with potential customers in order to expand Bal Nut's market, and if it could expand that market, it could expand to include more growers. (BN1, par. 2; Tr. 269)

185. Mr. Balice testified that his small company cannot afford a person to keep up with paperwork that is necessary to receive credit against advertising assessments, but Bal Nut is large enough that Mr. Balice does not have time to personally deal with the paperwork. (BN1, par. 2)

186. Mr. Balice believes he knows better than the Almond Board, the best way to promote Bal Nut's product in order to increase its profit and the amount it can pay growers. (BN1, par. 2)

Jardine Organic Ranch

187. Jardine Organic Ranch is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Jardine Organic Ranch to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Jardine Organic Ranch seeks to have the Almond Order's

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Promotion Plan and implementing regulations declared unlawful as they applied to Jardine Organic Ranch for the 1986-1987 marketing year and every subsequent marketing year.

188. Duane Jardine owns Jardine Organic Ranch and from the crop years 1986-87 through the 1994-95 crop Jardine has marketed only organically grown almonds, and organically grown almonds account for less than 1% of all of the almonds grown in California. (JOR1, par. 1)

189. Jardine is a very small handler, marketing anywhere from 40,000 to 120,000 pounds per year, and so the advertising assessment imposed by USDA and the Almond Board ranges anywhere from $1,000.00 to $3,500.00, which is a lot of money to Jardine. (JOR1, par. 1)

190. Some years Jardine exports 100% of its product, some years its domestic shipments are 100%, and some years it does both, but all of its buyers insist upon organically grown and processed almonds, and therefore Jardine's product does not compete with 99% of the almonds grown in California. (JOR1, par. 1)

191. Jardine's buyers are willing to pay a premium price for organically grown almonds. The Almond Board's promotional program has never promoted or advertised organically grown almonds, and Jardine does not want to be associated with any organization that does not promote organically grown products. (JOR1, par. 1)

192. Jardine markets its products, through contact by telephone and meeting potential buyers at Jardine's booth at food expeditions. Other buyers find out about his product through promotional work done by the Farm Verified Organic Program

which promotes certified organic products, which is not connected to the Almond Board. (JOR1, par. 2)

193. On several occasions Jardine has redesigned boxes and packaging using different labeling and sizes to accommodate customers, but that is not an expense which is creditable under the Almond Board regulations. (JOR1, par. 2)

194. Jardine has also spent money bringing customers to Jardine's premises, but that is not creditable under the Almond Board regulations. (JOR1, par. 2)

195. Jardine has received credit for billboard advertising in California, and is eligible for credit-back on its participation at food trade shows, but none of the other ways that Jardine would use to promote its product are creditable under the Almond Board regulations. (JOR1, par. 3; Tr. 288-289)

196. Jardine has been a long time critic of the Almond Board's advertising regulations and its generic program, because its program does not assist in selling organically grown almonds, and in Mr. Jardine's opinion, there is no way that the Almond Board can assist Jardine in promoting his organically grown almonds. (JOR1, par. 5)

B. The Almond Order and Its Promotion Program

197. The Secretary promulgated the Almond Marketing Order in 1950, pursuant to statutory authority, pertinent regulations and implementing rulemaking actions. 7 U.S.C. §§ 601 *et. seq.* (1994); 7 C.F.R. §§ 981.1-474 (1994); 15 Fed. Reg. 4272; 15 Fed. Reg. 3623 (1950).

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198. The Almond Order was promulgated to stabilize the almond industry. There were high levels of production that were predicted to continue. There was evidence that indicated that if current production levels continued, there would be a significant decrease in price. The Order's goal is to provide an "adjustment of the supply of almonds to the domestic trade demand," and as a result, increase grower returns. 15 Fed. Reg. 3623, 3624 (1950).

199. The Almond Order contains provisions for advertising and promotion by the Almond Board which administers the Order and the regulations which implement the advertising and promotion program. The Almond Board gives credit against "advertising assessments" to those handlers who engage in specified forms of branded advertising and brand promotion. The purpose of both the Board's generic advertising and promotion, which is paid for out of those "advertising assessments" actually collected from handlers, and for the branded advertising and promotion which the Promotion Program encourages, through the credits, is to achieve the Order's asserted goal.

200. The Almond Board's generic advertising and promotion activities seek to build demand through the changing of consumer preferences by providing information to manufacturers and end users about the essential features of almonds.

201. Increasing the demand for a product involves influencing consumer attitudes so that more of a product can be sold at the given price, the same amount can be sold at a higher price, or more of the product can be sold at a higher price.

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202. The marketing mix available to firms and organizations marketing products and services includes advertising, promotion, publicity and public relations.

203. Advertising is defined as paid broadcasting of a message in the television, radio, or print media. It can also involve the providing of point-of-purchase materials to retailers. Promotion involves the placing of information oriented messages such as a product's nutritional aspects or suggestions for its preparation, in the various media.

204. Since advertising is an efficient way of reaching a large number of people, organizations that market products that are aimed directly to consumers spend considerable sums on advertising.

205. An acceptable working definition of "generic advertising", which respondent has requested as a finding, is the cooperative effort among producers of a nearly homogenous product to disseminate information about the underlying general attributes of the product to existing and potential customers for the purpose of strengthening demand for the commodity.

206. An acceptable working definition of "branded advertising", which respondent has requested as a finding, is the effort of an individual firm in the product category that emphasizes the particular attributes of its brand as compared to competing brands.

207. Brand and generic advertising can be complementary when they have mutually reinforcing effects on consumer choice.

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208. The rationale for government compelled advertising and promotion assessments has been that everyone who benefits from advertising should share equitably in its cost and not be a "free rider."

209. All six agricultural economists called by the government as expert witnesses, Dr. Ronald Ward, Dr. Henry Kinnucan, Dr. Richard Sexton, Dr. Jason Christian, Dr. Hoy Carman, and Dr. Olan Forker, are experienced researchers on the impact of advertising on commodities. Dr. Russell Winer and Dr. Margaret Campbell, professors of marketing, are experts in the area of advertising theory. The agricultural economist called by petitioners, Professor Michael K. Mohlgenant is also an experienced researcher. Professor Scott Davis who was called by petitioners is an expert in the area of marketing and advertising theory as well as economics.

210. The testimony of the agricultural economists called by the government and the empirical results from their studies on various agricultural commodities confirm that cooperative generic advertising and promotion can be a viable tool for building demand and ultimately increasing producer returns.

211. In assessing the effectiveness of the Almond Order Promotion Program, it is important to note that there are two very distinct Almond Board advertising and promotion programs at issue.

212. The first, the "creditable advertising" program was in effect through and including the 1992-1993 season (July 1, 1992 to June 30, 1993 - 7 C.F.R. 981.10). This was essentially a program of creditable industry advertising with a small and ineffective Almond Board generic element.

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213. The second program, the "credit-back" program began with the 1993-1994 season. It envisions a large, amply funded generic advertising, promotion and public relations program operated by the Almond Board, with various efforts in both the domestic and export markets. It allows handlers to receive partial credit back for thirteen more forms of branded advertising and brand promotion efforts by handlers than were allowed as "creditable" under the former program.

214. Blue Diamond Growers, Inc, dominated the pre-1991 period of the "creditable advertising" program. Respondent has estimated that Blue Diamond represented well over 60% of the industry from 1960 through 1980 and after 1980, remained over 50% through the 1990-91 market year. Blue Diamond has generally sold approximately 90% of all almonds sold to the domestic retail trade either as snacks or for home cooking use.

215. During the 1987-88 through the 1990-91 marketing years, the total expenditure by the Almond Board for generic advertising, promotion and public relations ranged between $840,000 to $1,400,000 per year, whereas during the same time period, Blue Diamond spent $8,000,000 to $14,200,000 per year on its branded advertising which was primarily directed to the domestic retail market.

216. Algernon Greenlee is a retail business manager for Blue Diamond Growers, and for the previous six years had been the advertising manager. (Tr. Greenlee 297)

217. Blue Diamond sells almonds in approximately 96 countries around the globe. Domestically, Blue Diamond sells almonds to ingredients users and sells its own retail line of store shelf snack almonds. (Tr. Greenlee 298-299)

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218. Blue Diamond believes that its various types of advertising have been effective. (Tr. Greenlee 300)

219. Because the advertisement assessment rate was lowered, Blue Diamond has decreased the amount it spends on advertising. (Tr. Greenlee 306-307)

220. Blue Diamond had no research as to whether or not their advertisements actually increased consumption of Blue Diamond almonds. (Tr. Greenlee 314-317)

221. Blue Diamond will not advertise when it does not realize a favorable return on the dollars spent. (Tr. Greenlee 319-320)

222. Blue Diamond discontinued advertising their Can-A-Week advertising program because they did not see a return on the dollars spent. (Tr. Greenlee 320)

223. Blue Diamond has a sales force that calls on customers which it believes helps promote the sale of almonds. (Tr. Greenlee 321-322)

224. Blue Diamond believes that sales contacts with buyers does increase the overall demand for almonds. (Tr. Greenlee 332-333)

225. Blue Diamond would not support a total generic program run by the Almond Board. (Tr. Greenlee 333)

226. Blue Diamond is not convinced that the overall consumption of almonds would increase if the Almond Board had a straight generic advertising program. (Tr. Greenlee 333-334)

227. Blue Diamond does not need encouragement from USDA to promote its almond products and would continue to engage in branded advertising in the absence of the Almond Order's Promotion Program. (Tr. Greenlee 334-335)

228. For most of the years from 1980 through 1991-92 the creditable advertising assessment rates were 2 1/2 cents per pound. The Almond Board had a much smaller generic promotional program during that period of time and no foreign promotional program. (Tr. Greenlee 336)

229. Blue Diamond advertises because Blue Diamond believes that there is a return on that investment. (Tr. Greenlee 339)

230. When the advertising assessment rate was 2 1/2 cents per pound Blue Diamond believes that it hurt their returns to their growers; it did not earn Blue Diamond more than the 2 1/2 cents that was spent. (Tr. Greenlee 339)

231. The retail line of almonds, which includes snack almonds, almonds that a consumer would buy for baking purposes, and bulk almonds sold to the produce departments of grocery chains makes up only 20 to 30% of all almonds sold domestically or 10 to 15% of all of the almonds sold worldwide. (Tr. Greenlee 342-343)

232. Blue Diamond has close to 90% of that retail market. (Tr. Greenlee 343)

233. The primary other competition for the retail almond trade is from companies not regulated under the marketing order, such as Fishers and Planters. (Tr. Greenlee 343-344)

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234. The percentage of the domestic sales that go to the retail markets has not increased over the last five years. (Tr. Greenlee 344)

235. A premium price is paid for the retail almond line. (Tr. Greenlee 344)

236. Blue Diamond sets its advertising expenditures in accordance with the assessment rate. (Tr. Greenlee 338, 351) But Blue Diamond would continue to advertise without the compulsion of the marketing order. (Tr. Greenlee 339)

237. Blue Diamond is concerned that in the absence of the Almond Order's Promotion Plan, it would spend more money on advertising than competing independent packers. (Tr. Greenlee 351)

238. During the Almond Board's compelled advertising program when the creditable advertising assessment was usually set at 2 1/2 cents per pound, several major independent companies went out of business. (Tr. Greenlee 355-356)

239. Approximately 2 years ago the Board retained the firm of Hallberg and Schierson to determine the effectiveness of the Board's generic program, and it was their opinion that the Board's past program had not been effective. (Tr. Greenlee 356-357)

240. When the Almond Board began receiving "MPP Money" from the Federal Government for overseas advertising, Blue Diamond received the majority of the funds. (Tr. Greenlee 357-358)

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241. In approximately 1990, Blue Diamond spent approximately seven million dollars in television advertising, but today it is only spending two to three million dollars. If Blue Diamond thought that it was receiving $2 for every $1 of advertising money spent, it would spend more money. (Tr. Greenlee 363-364)

242. The price paid for almonds does not necessarily correlate with the return on acreage owned by a grower. (Tr. Greenlee 367-368)

243. As of the 1993-94 crop year, Blue Diamond marketed between 30 and 40% of the entire California tonnage, but received over 50% of the foreign agricultural service MPP funding to the almond industry. (Tr. Easter 374-376)

244. The vast majority of all almonds grown in California are sold as ingredients used in other products, with candies the largest ingredient usage, cereal being the second largest, ice cream being the third, and almonds used as snacks being a very small percentage of the sales of almonds. (Tr. Lundeen 1305-1308)

245. The previous Almond Board regulations gave handlers a financial incentive to purchase 1/2 ounce generic charity packs from the Almond Board, and several witnesses testified that they did so. (Ryan Tr. 406; Campos Tr. 593, 605) However, it is questionable whether the distribution of these packs to schools and charities increased the overall demand for almonds. (Phinney Tr. 2256) Dr. Campbell, the marketing expert called by USDA, agreed that managers in each handler's firm know best how to advertise and promote their products. (Tr. Campbell 1746-1747), and that personal selling can encourage

new product usage and improve overall demand for the product. (Tr. Campbell 1764)

246. Several of the USDA's experts admitted that many of their studies had indicated that other advertising and promotion programs had been failures, including those for avocados; (Tr. Carman 1166); apples, (Tr. Carman 1181); dairy, (Tr. Ward 1528); and beef, (Tr. Kinnucan 744). One of USDA's experts, Dr. Kinnucan, noted that there have been many other instances where economists found that generic advertising has been ineffective, although many of them are not published, because it is difficult to get the "failures" published. (Tr. Kinnucan 714)

247. Except for Dr. Jason Christian, of the School of Economics, University of California-Davis, none of the economic experts called by respondent had studied the effect of advertising in the almond industry. (Tr. Dr. Sexton 929-931; Tr. Dr. Carman 1176-1177; Tr. Dr. Kinnucan 731-733; Tr. Dr. Winer 776-778; Tr. Dr. Forker 853-856; Tr. Dr. Ward 1487-1490; Tr. Dr. Campbell 1733-1734)

248. Dr. Jason Christian prepared a written statement of his testimony (RX Ex. 252), authored a study entitled "Individual Industry Effects of Branded Advertising of California Almonds" (RX 31, numbered pages 320-344) in February of 1994 and produced another study of September 19, 1994 entitled "The Economic Effects of Advertising in the California Almond Industry" (RX 159). Dr. Christian was called by USDA as its primary expert witness as to the effectiveness of the Almond Board's advertising program (RX 252).

249. When the Almond Board contracted with Dr. Christian to research the economic effects of advertising in the California

almond industry, the only data on advertising expenditures given him was Blue Diamond's.

250. Dr. Christian found a direct correlation between the total volume of almonds sold and the amount Blue Diamond spent each year to advertise. He concluded that the more Blue Diamond advertised, the more demand increased. However, because Blue Diamond correlated its advertising budget to the amount of its annual advertising assessment which was computed on a per pound handled basis, the amount Blue Diamond spent on advertising was obviously greater in the years when the higher volumes were sold; and it may well be that higher sales volumes caused higher advertising expenditures by Blue Diamond, and not the other way around. (Dr. Wohlgenant, J. Pet #2, page 7, par. 6)

251. Dr. Christian's September 19, 1994 report (Rx 159), did not examine the effects of the Almond Board's generic advertising program.

252. None of Dr. Christian's studies measured the effect of advertising after 1992 and the Almond Board's current advertising and promotional activity was not examined by Dr. Christian. (Christian Tr. 1004)

253. Dr. Christian's study did not enable him to distinguish the impact Blue Diamond's advertising may have had on the sales of products containing almonds.

254. Dr. Christian's studies are unable to demonstrate differentiated advantages among growers or handlers attributable to Blue Diamond's advertising. (Christian Tr. 1005)

255. Dr. Christian did not undertake to answer whether the generic promotion by the Almond Board, or the brand advertising and promotion by handlers other than Blue Diamond had an effect on overall almond demand.

256. Professor Scott Davis of the Graduate School of Management. University of California-Davis, a trained economist and an expert in marketing and advertising, testified that inasmuch as the advertising conducted by Blue Diamond during the time period studied by Dr. Christian was primarily directed to the retail market (Can-A-Week), one would expect substantial growth in the demand by the household consumption market as compared to the share attributable to demand by ingredients buyers. However, the opposite was true. (Dr. Davis, J. Pet #1, page 8) It is found, therefore, as Dr. Davis asserted, that it is most improbable that Blue Diamond's advertising was the primary stimulator of increased demand by ingredients buyers.

257. Advertising in the United States has not caused the volume of exports to increase. (Christian Tr. 1007)

258. Although it may be that under "The Law of One Price", Blue Diamond's advertising helped it sell more almonds domestically, and this in turn resulted in Blue Diamond having less almonds for export which may have led to higher prices overseas, where demand is inelastic[8], it is not appropriate to characterize Blue Diamond's competitors as "free riders" who should be compelled to make equivalent expenditures in compensation for this kind of incidental benefit. This benefit is far too remote; it is unintended; and it is not proportional to the

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8. When demand is inelastic, a price increase will not result in a lessening of demand; when demand is elastic, an increase in price will decrease sales.

benefits realized by Blue Diamond in capturing additional sales in the more profitable domestic retail market.

259. There are a number of expenditures that go into the marketing mix, and advertising is only one element that can be used to expand the demand for a product. Other communication tools that are available include promotions, such as free samples or special displays, publicity (such as press releases that communicate new product benefits), personal selling, product improvement and improved availability which make the product more attractive to potential customers and raise their willingness to pay for the product. Christian's study never addressed the influence of these other selling techniques on raising the demand for almonds or on the grower return. (Dr. Davis, J. Pet. No. 1, page 2, pages 8-9, 13-14)

260. The advertising and promotional program permitted by the Board for credit and the promotional material published by the Almond Board seem unlikely to have stimulated demand by ingredient buyers, where most of the almonds are sold. (Dr. Davis, J. Pet. Ex. 1, page 8)

261. Growers have not significantly benefitted from the ineffective and inconsequential branded advertising and brand promotion by the independent handlers who compete with Blue Diamond, which the "creditable advertising" and the "credit-back" programs have induced. Nor have these branded advertisements and promotions more effectively expanded the overall market for almonds than would have resulted from the efforts of these handlers in the absence of the Almond Order's Promotion Plan.

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Conclusions of Law

A. Respondent has the burden of proof in these proceedings. *Cal-Diamond, Inc. v. United States Department of Agriculture,* 14 F.3d 429 (9th Cir. 1993).

B. Respondent has failed to meet its burden of proving that the Almond Board's advertising and promotional program for the crop years 1986-87 through 1994-95 directly advanced the governmental interest of selling more almonds and increasing returns to growers which USDA asserted in justification of its regulation of petitioners' commercial speech.

C. Respondent has failed to meet its burden of proving that the Almond Board's advertising and promotional program for the crop years 1986-87 through 1994-95 was no more extensive than necessary to serve the governmental interest of selling more almonds and increasing returns to growers which USDA asserted in justification of its regulation of petitioners' commercial speech.

D. For the foregoing reasons, the Almond Board's advertising and promotional program for the crop years 1986-87 through 1994-95 was not in accordance with law.

Done at Washington, D.C.
this 15th day of June, 1995

s/ Victor W. Palmer
VICTOR W. PALMER
Chief Administrative Law Judge

APPENDIX C — 7 C.F.R. § 981.441

7 CFR Sec. 981.441, Credit for market promotion activities, including paid advertising.

Excerpt from page 24790 follows

CODE OF FEDERAL REGULATIONS
TITLE 7 — AGRICULTURE
SUBTITLE B — REGULATIONS OF THE DEPARTMENT OF AGRICULTURE
CHAPTER IX — AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; FRUITS, VEGETABLES, NUTS)
PART 981 — ALMONDS GROWN IN CALIFORNIA
SUBPART — ADMINISTRATIVE RULES AND REGULATIONS

Titles 1-50 current through January 1, 1996; 60 FR 67518

Sec. 981.441 Credit for market promotion activities, including paid advertising.

(a) In order for a handler to receive credit for his/her own promotional activities from his/her pro rata portion of advertising assessment payments, pursuant to Sec. 981.41(c), the Board must determine that such expenditures meet the applicable requirements of this section. Credit will be granted either in the form of a payment from the Board, or as an offset to the advertising assessment if activities are conducted and documented to the satisfaction of the Board at least two weeks prior to assessment billings. Credit, hereinafter termed 'Credit-Back', will be granted in an amount not to exceed 66 2/3 percent of a handler's proven expenditures for qualified activities.

(b) The portion of the handler assessment for which credit may be received under this section will be billed, and is due and payable, at the same time as the portion of the handler assessment used for the Board's administrative expenses, unless the handler(s) conduct and document activities at least two weeks prior to assessment billings. In the latter case, handlers' advertising assessment obligations will be reduced according to the amount of proven activities approved by the Board.

(c) The Board shall grant Credit-Back for qualifying activities only to the handler who performed such activities and who filed a claim for Credit-Back in accordance with this section.

(d) Credit-Back shall be granted only for qualified promotional activities which are conducted and completed during the crop year for which Credit-Back is requested.

(e) The following requirements shall apply to Credit-Back for all promotional activities:

(1) Credit-Back granted by the Board shall be that which is appropriate when compared to accepted professional practices and rates for the type of activity conducted. In the case of claims for Credit-Back activities not covered by specific and established criteria, the Board shall grant the claim if it is consistent with practices and rates for similar activities. To this end, the Board may issue guidelines for qualifying activities from time to time as warranted. For activities in markets other than the United States and Canada, paragraph (e)(5) of this section shall also apply.

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Excerpt from page 24791 follows

(2) The clear and evident purpose of each activity shall be to promote the sale, consumption or use of California almonds, and nothing therein shall detract from this purpose.

(3) No Credit-Back will be given for advertising placed in publications that target the farming or grower trade. No Credit-Back shall be given for any outdoor advertising or sponsorships in the California almond growing counties of Butte, Colusa, Fresno, Glenn, Kern, Madera, Merced, Sacramento, San Joaquin, Stanislaus, and Tulare counties, except that, outdoor advertising in these counties which specifically directs consumers to a handler-operated outlet offering direct purchase of almonds will be eligible for Credit-Back.

(4) Credit-Back shall be granted for those qualified activities specified below, except that Credit-Back for travel expenses will not be allowed in any case.

(i) Paid advertising directed to end-users, trade or industrial users. Credit-Back shall be granted for money spent on paid advertising space or time including, but not limited to, newspapers, magazines, radio, television, transit and outdoor media, and including the standard agency commission costs not to exceed 15 percent of gross.

(ii) Other market promotion activities. Credit-Back shall be granted for market promotion other than paid advertising, for the following activities:

(A) Marketing research (except pre-testing and test-marketing of paid advertising);

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(B) Trade and consumer product publicity;

(C) Printing costs for promotional material;

(D) Direct mail printing and distribution;

(E) Retail in-store demonstrations;

(F) Point-of-sale materials (not including packaging);

(G) Sales and marketing presentation kits;

(H) Trade fairs and exhibits;

(I) Trade seminars;

(J) 50/50 advertising with retailers;

(K) Couponing (printing, distribution and handling costs only);

(L) Purchase of Board produced promotional materials; and

(M) Sponsorships

(iii) For any qualified activity involving joint participation by a handler and a manufacturer or seller of a complementary product(s), or a handler selling multiple complementary products, including other nuts, with such activity including the handler's name or brand, or the words 'California Almonds', the amount allowed for Credit-Back claim shall reflect that portion

of the activity represented by almonds, or the handler's actual payment, whichever is less.

(iv) When products containing almonds are promoted, the amount allowed for Credit-Back shall reflect that portion of the product weight represented by almonds, or the handler's actual payment, whichever is less. In addition, the product must display the handler's name or brand, or the words 'California Almonds' on the primary, face label.

Excerpt from page 24792 follows

(5) Credit-Back for promotional activities in a foreign market shall be granted at 66 2/3 percent of a handler's unreimbursed expenditures for qualified activities in any foreign market, if the handler is promoting pursuant to a contract with the Foreign Agricultural Service, USDA (FAS) and/or the California Department of Food and Agriculture (CDFA). Such activities must also meet the requirements of paragraphs (e) (1), (2), (3), (4), and (6) of this section. Unless the Board is administering the foreign marketing program, such activities shall not be eligible for Credit-Back unless the handler certifies that he/she was not and will not be reimbursed by either FAS or the CDFA for the amount claimed for Credit-Back, and has on record with the Board all claims for reimbursement made to FAS and/or the CDFA. Foreign market expenses paid by third parties as part of a handler's contract with FAS or CDFA will not be eligible for Credit-Back.

(6) A handler must file claims with the Board to obtain Credit-Back for promotional expenditures, as follows:

(i) All claims submitted to the Board for any qualified activity must include:

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(A) A description of the activity and when and where it was conducted;

(B) Copies of all invoices from suppliers or agencies;

(C) Copies of all canceled checks issued by the handler in payment of these invoices; and

(D) An actual sample, picture or other physical evidence of the activity.

(ii) Handlers may receive credit against their assessment obligation up to the advertising amount of the assessment installment due; Provided: That the handler submits the required documentation for a qualified activity at least two weeks prior to the mailing of assessment notices from the Board. In all other instances, handlers must remit the advertising assessment to the Board when billed, and a refund will be issued to the extent of proven, qualified activities.

(iii) Checks from the Board in payment of approved Credit-Back claims will be mailed to handlers on February 15, April 15, June 15, and 30 days after submission of final claims for the crop year pursuant to paragraph (e)(6)(iv) of this section. To receive payment on these dates, handler claims must be submitted, with all required elements, at least one month prior to the payment date. A handler can receive Credit-Back for his/her allowable direct expenditures only up to the amount of that portion of the handler's assessment designated for marketing promotion, including paid advertising.

(iv) A statement of the Credit-Back commitments outstanding as of the close of a crop year must be submitted in full

to the Board within 15 days after close of that crop year. Final claims must be submitted within 105 days after the close of that crop year.

(f) Appeals. If a determination is made by the Board staff that a particular promotional activity is not eligible for Credit-Back because it does not meet the criteria specified herein, or for any other reason, the affected handler may request the Public Relations and Advertising Committee to review the Board staff's decision. If the affected handler disagrees with the decision of the Public Relations and Advertising Committee, the handler may request that the Board review the Committee decision. If the handler disagrees with the decision of the Board, the handler, through the Board, may request that the Secretary review the Board's decision. Handlers have the right to request anonymity in the review of their appeal. The Secretary maintains the right to review any decisions made by the aforementioned bodies at his/her discretion.